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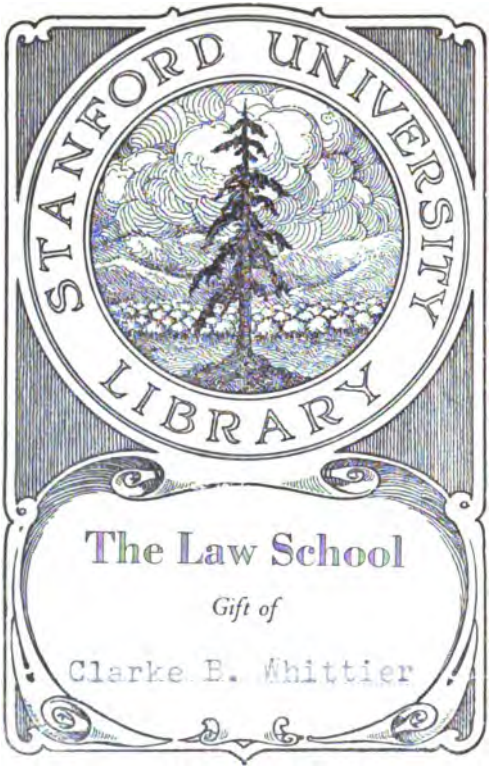
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CASES ILLUSTRATING THE PRINCIPLES OF THE LAW OF TORTS

LONDON

HENRY FROWDE, M.A.

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AND

STEVENS AND SONS, LIMITED

CASES ILLUSTRATING THE PRINCIPLES OF THE LAW OF TORTS

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PREFACE

THIS book is an attempt to illustrate the principles underlying the main branches of the Law of Torts by a selection from the original authorities. With this object in view the headnotes of all the cases have been rewritten so as to state the principle established by each case rather than the application of that principle to a particular set of facts. The notes are mainly explanatory or supplemental; but in two or three cases, as in the note to *Asher* v. *Whitlock*, they are an attempt to present an accurate statement of the existing law on certain difficult points.

Owing to the exigencies of space it has been necessary to omit portions of the cases as originally reported. This has been done for the most part by omitting or reducing long statements of facts, arguments of counsel where not necessary to explain the judgements, and concurring judgements where they did not seem to add anything to that reported. Where a judgement has dealt with more than one subject those portions which are not relevant to the principle under discussion have been omitted. Excisions from a judgement have been indicated by dots.

It remains for us only to acknowledge our indebtedness to the Incorporated Council of Law Reporting, to the proprietors of the Law Journal, and to Messrs. Stevens & Sons, Limited, for permission to reprint many

of the cases in this collection. We have also to thank Sir Frederick Pollock, Bart., for his courtesy in permitting us to follow his method of arrangement (we have not always been enabled to avail ourselves of this permission, as the cases selected to some extent naturally group themselves in a different order). Dr. W. Blake Odgers, K. C., has been good enough to revise for us our selected cases and their headnotes on the subject of 'Defamation,' for which we express our very hearty acknowledgements. We have to thank the Warden and Fellows of All Souls College, Oxford, for permission to work in their admirable Law Library, and the Sub-Librarian for his unremitting courtesy and attention. And, last but not least, our best thanks are due to Mr. Noel Middleton of the Western Circuit, Barrister-at-Law, who has been good enough to undertake the laborious duty of revising the proofs of this book, and whom we have also to thank for many useful suggestions.

F. R. Y. R.
J. C. M.

THE TEMPLE:
July, 1904.

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ASSAULT.

1669. TUBERVILLE *v.* SAVAGE, 1 Mod. R. 3.

In an action for assault the intention as well as the act of the aggressor must be regarded.

1669.
TUBERVILLE v. SAVAGE.

ACTION of assault, battery and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword, and said: 'If it were not assize time, I would not take such language from you.'

The question was, if that were an assault?

The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the judges being in town; and the *intention* as well as the *act* makes an assault. Therefore, if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike *at* another and miss him, this is an assault; so if he hold up his hand against another, in a threatening manner, and say nothing, it is an assault.

In the principal case the plaintiff had judgement.

1861. BLADES *v.* HIGGS, 30 L. J. C. P. 347; S. C. 10 C. B. N. S. 713.

The rightful owner (or his servants acting by his command) may justify an assault in order to re-possess himself of land or goods which are wrongfully in the possession of another, no unnecessary violence being used.

1861.
BLADES v. HIGGS.

Trespass.—Declaration, that the defendants assaulted and beat, and pushed about the plaintiff, and took from the plaintiff the plaintiff's goods, that is to say, dead rabbits.

Third plea, as to the assaulting, beating and pushing the plaintiff, that the plaintiff at the said time when &c. had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plaintiff without the leave and licence and against the will of the said Marquis, and the plaintiff was about wrongfully and

1861.

BLADES v. HIGGS.

unlawfully to take and carry away the said rabbits and convert the same to his own use, whereupon the defendants, as the servants of the said Marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and thereupon the defendants, as the servants of the said Marquis and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary, which are the alleged trespasses.

Demurrer and joinder.

The judgement of the Court[1] was, June 8, delivered by

ERLE, C. J.—In this case the declaration was for assault and battery, and the substance of the justification was, that the plaintiff having wrongfully in his possession rabbits belonging to the defendant (we consider the servants here the same as the master), and being about to carry them away, the defendant requested him to refrain, and on his refusal *molliter manus imposuit*, and used no more force than was necessary to take the rabbits from him. To this the plaintiff demurred, and thereby admits that he was doing the wrong, and that the defendant was maintaining the right as alleged; and he contends that the defendant is not justified in using necessary force on account of the danger to the public, but adduces no authority to support his contention. The defendant also has adduced no case where this justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgement decisive to show that the plea is good, although that allegation is not made. If the defendant had actual possession of the chattel, and the plaintiff took it from him against his will, it is not disputed that the defendant might justify using the force sufficient to defend his right and re-take the chattel; and we think that there is no substantial distinction between that case and the present; for if the defendant was the owner of the chattel, and entitled to the possession of it, and the plaintiff wrongfully detained it from him after request, the defendant in law would have the possession, and the plaintiff's wrongful detention against the request of the defendant would be no possession, but would be

[1] Erle, C. J., Willes, J., and Byles, J.

1861.

BLADES v. HIGGS. — Erle, C. J.

the same violation of the right of property as the taking of the chattel out of the actual possession of the owner. It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land as well as chattels, the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified: see *Newton* v. *Harland*[1]. But in respect of land, that argument has been overruled in *Harvey* v. *Brydges*[2]. There Parke, B., says, 'Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party; and I cannot see,' he says, 'how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed.'

In our opinion all that is so said of the right of property in land applies in principle to the right of property in a chattel, and supports the present justification. If the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the mischief instead of redressing it, and on these grounds our judgement is for the defendants.

Judgement for the defendants.

NOTE.—Compare the case of *Beddall* v. *Maitland*, infra.—[ED.]

1891. STANLEY *v.* POWELL, L. R. 1891, 1 Q. B. 86.

An action cannot be maintained for injury to the person where the act complained of is involuntary and unaccompanied by negligence.

1891.

STANLEY v. POWELL.

Further consideration before DENMAN, J.

The facts and arguments sufficiently appear from the judgement.

[1] 1 Man. & G. 644. [2] 14 M. & W. 437.

1891.

STANLEY v. POWELL.

DENMAN, J.—This case was tried before me and a special jury at the last Maidstone Summer Assizes.

In the statement of claim the plaintiff alleged that the defendant had *negligently and wrongfully and unskilfully* fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury: (1) Was the plaintiff injured by a shot from defendant's gun? (2) Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? (3) Damages.

The undisputed facts were, that on November 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his second barrel and killed the bird; but that a shot, glancing from the bough of an oak which was in or close to the hedge, and striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line, that the shot must have been diverted to a considerable extent from the direction in which the gun must have

1891.

STANLEY v. POWELL. — Denman, J.

been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases—that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the Court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the Court for judgement; but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgement, notwithstanding that I had left the parties to move the Court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that by no amendment that could be made consistently with the finding of the jury could I properly give judgement for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain dicta which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold that, if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favourable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts, sworn to by his witnesses, which

1891.

STANLEY v. POWELL.

Denman, J.

the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. VII, 28 A., which is referred to by Grose, J., in the course of the argument in *Leame* v. *Bray*[1], to be mentioned presently, in these words: 'There is a case put in the year-book, 21 Hen. VII, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass.' Returning to the case in the year-book, it appears that the passage in question was a mere dictum of Rede, who (see 5 Foss's *Lives of the Judges*, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, 'Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.' But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be primâ facie a trespass may be excused. The next case in order of date relied upon for the plaintiff was *Weaver* v. *Ward*[2], decided in 1607. There is no doubt that that case contains dicta which *per se* would be in favour of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are primâ facie trespasses: 'Therefore, no man shall be excused of a trespass .... except it may be judged utterly without his fault,' showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the train-band, and the one, '*casualiter, et per infortunium, et contra voluntatem suam*' (which must be translated 'accidentally and involuntarily'), shot the other, an action of trespass would lie, *unless* he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve

[1] 3 East, 593. [2] Hob. 134.

considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of *Gibbons* v. *Pepper*[1], decided in 1695, merely decided that a plea showing that an accident caused by a runaway horse was *inevitable*, was a bad plea in an action of trespass, because, if *inevitable*, that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgement, which show clearly the *ratio decidendi* of that case, are these: 'He should have pleaded the general issue, for if the horse ran away against his will he would have been found *not guilty*, because in such a case it cannot be said with any colour of reason to be a battery in the rider.' The more modern cases of *Wakeman* v. *Robinson*[2] and *Hall* v. *Fearnley*[3] lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of dictum in favour of the plaintiff, and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgement explains *Wakeman* v. *Robinson*[2] thus: 'The act of the defendant' (viz. driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) 'was primâ facie unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman* v. *Robinson*[2]. It was there agreed that an *involuntary* act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the *omission to plead* the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover.'

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of *Underwood* v. *Hewson*[4], decided in 1724, was relied on for the plaintiff. The report is very short. 'The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass—Strange *pro defendente*.' The marginal

[1] 4 Mod. 404. [2] 1 Bing. 213. [3] 3 Q. B. 919. [4] 1 Str. 596.

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note in Nolan's edition of 1795, not necessarily Strange's own composition, is this—'Trespass lies for an accidental hurt'; and in that edition there is a reference to Buller's *N. P.*, p. 16. On referring to Buller, p. 16, where he is dealing with *Weaver* v. *Ward*[1], I find he writes as follows: 'So (it is no battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the Court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam*; for no man shall be excused of a trespass, unless it be justified entirely without his default: *Weaver* v. *Ward*[1]; and, therefore, it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded: *Underwood* v. *Hewson*[2].' On referring back to *Weaver* v. *Ward*[1], I can find nothing in the report to show that the Court held, that in order to constitute a defence in the case of a trespass it is necessary to show that the act was *inevitable*. If *inevitable*, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver* v. *Ward*[1] really lays down is that 'no man shall be excused of a trespass except it may be judged utterly without his fault.'

Day v. *Edwards*[3] merely decides that where a man negligently *drives* a cart against the plaintiff's carriage, the injury being committed by the *immediate* act complained of, the remedy must be trespass and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was *Leame* v. *Bray*[4]. That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricle, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that 'the accident happened in a dark night, owing

[1] 14 Jac. I; Hob. 134.
[2] T. 10 Geo. I; per Fortescue and Raymond in Midd., Str. 596.
[3] 5 T. R. 648 (1794).
[4] 3 East, 593.

to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury.' The report goes on to state: 'But it did not appear that blame was imputable to the defendant in any *other* respect as to the manner of his driving. It was therefore objected for the defendant, that the injury *having happened from negligence* and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*; and the plaintiff was thereupon nonsuited.' On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by Lawrence, J., at p. 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgements to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the Court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of *Holmes* v. *Mather*[1], and Bramwell, B., in giving judgement in that case, dealt with them thus: 'As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions.'

[1] L. R. 10 Ex. 261.

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This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's *Abridgement,* Trespass, i. p. 706, with a marginal reference to *Weaver* v. *Ward* [1]. In Bacon the word 'inevitable' does not find a place. 'If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful' (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury as, for instance, in a case of self-defence) 'and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental' (by which I understand, 'that the injury was unintentional'), 'but likewise that it was not owing to neglect or want of due caution.' In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence,—there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned,—and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgement for the defendant. As to costs, they must follow unless the defendant foregoes his right.

Judgement for the defendant.

[1] 14 Jac. I; Hob. 134.

FALSE IMPRISONMENT.

1845. BIRD *v.* JONES, 7 Q. B. 742.

False imprisonment is a *total* restraint of the liberty of the person, for however short a time, without lawful excuse.

THIS action was tried before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas Term, 1843, when a verdict was found for the plaintiff.

In Hilary Term, 1844, Thesiger obtained a rule *nisi* for a new trial, on the ground of misdirection.

In Trinity Term in the same year (June 5), Platt, Humfrey, and Hance showed cause, and Sir F. Thesiger, Solicitor General, supported the rule.

The judgements sufficiently explain the nature of the case.

Cur. adv. vult.

In this vacation (July 9), there being a difference of opinion on the Bench, the learned judges who heard the argument delivered judgement *seriatim*.

COLERIDGE, J.—In this case, in which we have unfortunately been unable to agree in our judgement, I am now to pronounce the opinion which I have formed: and I shall be able to do so very briefly, because, having had the opportunity of reading a judgement prepared by my brother Patteson, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows.

A part of a public highway was enclosed, and appropriated for

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spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but, after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the enclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification.

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is

something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In *Com. Dig. Imprisonment* (G) it is said: 'Every restraint of the liberty of a free man will be an imprisonment.' For this the authorities cited are 2 *Inst.* 482; *Cro. Car.* 210[1]. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the Statute of Westminster 2nd[2], *in prisonâ*, and says, 'every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison.' The passage in *Cro. Car.*[1] is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate House Prison, to which they had been committed by the king. The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favour of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House: the occasion is somewhat singularly expressed in the decision of the Court, which was 'that their *voluntary* retirement to the close stool' in the Gate House 'made them to be prisoners.' The resolution, however, in question is this: 'that the prison of the King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison.'

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge: and I am unwilling to put any extreme case hypothetically: but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must be

[1] *Hobert & Stroud's Case*, Cro. Car. 209.

[2] 1 Stat. 13 Ed. I. c. 48.

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something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it.

Knowing that my Lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own: but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

WILLIAMS, J.—I also have had the benefit of seeing, and beg leave to refer to, what my brother Patteson has written, explaining the manner in which the only question now before us in this case is raised, and showing that it depends upon whether the following facts constitute an imprisonment in point of law.

A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage-way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage-way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour.

And, if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go

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in a particular direction, and was prevented; but, at the same time, another course was open to him. About the meaning of the word imprisonment, and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it may be, arises when the general rule is applied to the facts of a particular case.

'Every confinement of the person' (according to Blackstone [1]) 'is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets,' which, perhaps, may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his second *Institute* [2], speaks of 'a prison in law' and 'a prison in deed': so that there may be a constructive, as well as an actual, imprisonment: and, therefore, it may be admitted that personal violence need not be used in order to amount to it. 'If the bailiff' (as the case is put in Buller, *N. P.* 62) 'who has a process against one, says to him, "You are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process.' So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one *direction* prescribed to him than if the constable or bailiff had actually hold of him: no return or deviation from the course prescribed is open to him. And it is that *entire* restraint upon the will which, I apprehend, constitutes the imprisonment. In the passage cited from Buller's *Nisi Prius* it is remarked that, if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest, unless the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable, as only putting the case before us over again) any person to erect

[1] 3 Bl. *Com.* 127. [2] 2 *Inst.* 589.

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an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and, after some delay, to be compelled to return and take another and circuitous route to his place of destination: I do not think that, during such detention, such person was under imprisonment, or could maintain an action for false imprisonment, whatever other remedy might be open to him.

I am desirous only to illustrate my meaning and explain the reason why I consider the imprisonment in this case not to be complete. The reason shortly is, that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him if he chooses to avail himself of it.

PATTESON, J.—This was an action of trespass for an assault and false imprisonment. The pleas were: as to the assault, *son assault demesne*; as to the imprisonment, that the plaintiff, *before* the imprisonment, assaulted the defendant, wherefore the defendant gave him into custody. The replication was *De iniurid* to each plea. This puts in issue, as to the first plea, who committed the first assault; and, as to the second, whether the imprisonment was before or after the assault, if any, committed by the plaintiff. Supposing the defendant to have made the first assault, and the plaintiff to have followed, and much continuous assaulting to have taken place, the plaintiff must succeed on the issue as to the first plea. Supposing a continuous imprisonment to be established, and an assault by the plaintiff, but which took place in trying to escape from that imprisonment, and not before the imprisonment, the plaintiff must succeed on the issue as to the second plea. If, on the other hand, the plaintiff did assault the defendant *before* the imprisonment, then he must fail upon the issue as to the second plea, even if his assault was justifiable, because in that case he should have replied such justification, as, for instance, defence of his close, or that he was in the exercise of a right of way which the defendant obstructed, or other matter of justification.

Now the facts of this case appear to be as follows. A part of Hammersmith Bridge which is ordinarily used as a public footway was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage-way by a temporary

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fence. The plaintiff insisted on passing along the part so appropriated, and attempted to climb over the fence. The defendant, being clerk of the Bridge Company, seized his coat, and tried to pull him back: the plaintiff, however, succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway; but he was told that he might go back into the carriage-way, and proceed to the other side of the bridge, if he pleased. The plaintiff would not do so, but remained where he was above half an hour: and then, on the defendant still refusing to suffer him to go forwards along the footway, he endeavoured to force his way, and, in so doing, assaulted the defendant; whereupon he was taken into custody.

It is plain from these facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was climbing over the fence: and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled to retain the verdict which he has obtained on the issue as to the first plea. Again, if what passed *before* the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been *before* the imprisonment as alleged in the second plea, but during it, and in attempting to escape from it: and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question, whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law [1].

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that

[1] The Lord Chief Justice, on the trial, told the jury that an imprisonment had taken place before plaintiff assaulted defendant: which was the direction complained of.

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a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice Tindal involving this question[1]: but it appears that the plaintiff in that case was compelled to *stay* and hear a letter read to him against his will, which was doubtless a total restraint of his liberty whilst the letter was read.

I agree to the definition in Selwyn's *Nisi Prius*, title *Imprisonment*[2]: 'False imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, &c., or even by forcibly detaining the party in the streets, against his will.' He cites 22 *Ass.* fol. 104 B, pl. 85, per Thorpe, C. J. The word there used is 'arrest,' which appears to me to include a 'detaining,' as Mr. Selwyn expresses it, and not to mean merely the preventing a person from passing.

Upon the whole, I am of opinion that the only imprisonment proved in this case was that which occurred when the plaintiff was taken into custody *after* he had assaulted the defendant, and

[1] The case was alluded to in argument by Humfrey; but no name mentioned, nor details given.

[2] Vol. ii. p. 915, eleventh edition.

that the second plea was made out; I therefore think that the rule for a new trial ought to be made absolute.

Rule absolute.

Lord DENMAN, C. J., dissented.

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1838. GRAINGER *v.* HILL, 4 Bing. N. C. 212.

Placing a party under restraint of an officer of the law, who holds a warrant for his arrest, is an imprisonment, without actual contact by the officer, or by the party setting him in motion.

TINDAL, C. J.—This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendants for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the meantime, the plaintiff should retain the command of the vessel, and prosecute voyages therein for his own profit: that the defendants, in order to compel the plaintiff through duress to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount: that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, endorsed to levy £95 17*s.* 6*d.*, and kept him imprisoned, until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained; by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in trover for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground, under an application for a nonsuit, and in arrest of judgement.

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The first ground urged for a nonsuit is, that the facts proved with respect to the writ of *capias* do not amount to an arrest. It appears to me that the arrest was sufficiently established. The facts are, that the sheriff's officer comes with a *capias* to the plaintiff, when he is ill in bed, and tells him that, unless he delivers the register or finds bail, he must either take him or leave a man with him. Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shows

1888. GRAINGER v. HILL, — Tindal, C.J.

that the plaintiff was in a situation in which bail was to be procured; that was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's *Nisi Prius*, p. 62, goes the full length. 'If the bailiff, who has a process against one, says to him, when he is on horseback or in a coach, "you are my prisoner; I have a writ against you"; upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process.' But the matter does not rest there; for, upon the suit being arranged, a caption fee, which had been charged by the officer to the plaintiff, was repaid to him by the defendants, who thereby admit the propriety of the charge.

PARK, VAUGHAN, and BOSANQUET, JJ., delivered judgements to the like effect, and the rule was discharged.

1835. TIMOTHY *v.* SIMPSON, 1 C. M. & R. 757.

A private person is justified in arresting one who is committing a breach of the peace in his presence, where the affray is still continuing, or likely to be renewed.

1835. TIMOTHY v. SIMPSON.

PARKE, B., delivered the judgement of the Court.—This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity Term last, at Guildhall. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de iniuriâ suâ propriâ absque tali causâ*. On the trial, the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the Court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgement *non obstante veredicto*, the case was fully argued before my

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Brothers Bolland, Alderson, Gurney, and myself, last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window, with a ticket apparently attached to it, denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it 'an imposition.' Some of the shopmen desired him to go out of the shop in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing, or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on—many persons were there, and others about the street door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the meantime the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop insisting on his right to remain there, and a mob gathering round the door; when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

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Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police officer having, by the Stat. 10 Geo. IV, c. 44, s. 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest, in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock* v. *Hannemer*[1]; but whether he has that power, in order to take before a magistrate, that *he* may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power: 2 Hale's *Pleas of the Crown*, 89. And the same rule has been laid down at *Nisi Prius* by Lord Mansfield, in a case referred to in 2 East's *Pleas of the Crown*, 306; and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Campb. *N. P. C.* 421. On the other hand, there is a *dictum* to the contrary in Brook's *Abt. Faux Impt.* 6, which is referred to and adopted by

[1] Cro. Eliz. 376; Owen, 105, S. C. *nomine, Scarrel* v. *Tanner.*

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Lord Coke in 2 *Inst.* 52; Lord Holt, in *The Queen* v. *Tooley* [1], expresses the same opinion. Lord Chief Justice Eyre, in the case of *Coupey* v. *Henley* [2], does the same. And many of the modern text-books state that to be the law. Burn's *Justice*, twenty-sixth edition, *Arrest*, 258; Bacon's *Abt. D. Trespass*, 53; 2 East's *Pleas of the Crown*, 506; Hawkins's *Pleas of the Crown*, bk. ii, c. 13, s. 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray. It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lambard, in his *Eirenarcha*, c. 3, p. 130, says, 'Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol till it be known whether he, so hurt, will live or die, as appeareth by the Stat. 3 Hen. VII, c. 1.' In Hawk. *P. C.* bk. i, c. 63, s. 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice Buller, are to be found in 9 Went. *Plead.* 344, 345; and De Grey, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over,

[1] 2 Ld. Raym. 1301.

[2] 1 Esp. 540.

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but whilst he shows a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and *during the affray* the constable may not merely on his own view, but on *the information and complaint of another*, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord Hale, *P. C.*[1] The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighbourhood, and the persons of all those concerned, from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace as, upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace officers, whose power of interposition on their own view appears not to differ from that of any of the king's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer.

[1] Vol. ii. p. 89.

1827. Beckwith *v.* Philby and others, 6 B. & C. 635.

A constable having reasonable cause to suspect that a felony has been committed is justified in arresting the party suspected, although no felony has in fact been committed—*Aliter* in the case of a private person.

1827.

Beckwith v. Philby.

This was an action for assaulting, beating, handcuffing and imprisoning the plaintiff, and keeping and detaining him handcuffed and imprisoned, without any reasonable or probable cause, for forty-eight hours, on a false and pretended charge of felony. At the trial before Littledale, J., at the Spring Assizes for the county of Essex, 1827, the following appeared to be the facts of the case. The plaintiff was a blacksmith residing at Waltham Cross, in the county of Hertford. The defendant Philby was high constable of Ongar, in Essex, and resided at Loughton, in that county. The defendants, Wilks and Spicer, were constables of that parish. The plaintiff, on January 31, 1826, with a bridle and saddle on his back, was returning from Romford market, where he had sold a pony for £7 10*s*., and about half-past six in the evening sat down to rest himself near Loughton Bridge. While he was sitting there, one Gould, a farmer resident in the neighbourhood, passed him. Gould told Philby the circumstance, and said he thought he ought to look after the man. Philby went out and asked the plaintiff several questions, to which he gave such answers as induced Philby to think he had been stealing a horse, or was about to do so. The plaintiff was searched, and was again asked by Philby where he came from; the plaintiff then said that he had come from Cheshunt, and had been to Romford to sell a horse, that his name was Beckwith, and he had got the horse of one Bartlett. He then referred Philby to one Noble, who lived in the neighbourhood. No inquiry was made by Philby of Noble that night. Philby then sent for the defendant Wilks, to take the plaintiff to the watch-house, and on Wilks's arrival desired him to handcuff the plaintiff, which was done. Wilks took him, at his own request, to a public-house at Loughton, and he remained there handcuffed during the night. On the following morning Wilks delivered the plaintiff to the custody of Spicer, who took him to a magistrate, who examined him, and said he thought it his duty to detain him, but that if there was anybody near who would be bound for his

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appearance, he might go home to his family. Noble became bound for the plaintiff's appearance, and he was then discharged. Philby was present at this examination. On inquiry at Cheshunt it appeared that the plaintiff had bought a horse of Bartlett, as he had stated, and nothing subsequently appeared against his character. No horse had been stolen in or near Loughton on the day, or for some days before the plaintiff was apprehended, but within the preceding month many had been stolen. Upon the evidence it was contended on the part of the defendants that there was reasonable cause to suspect the plaintiff of having committed a felony; and that such reasonable cause of suspicion justified a constable or other peace officer in arresting and detaining the party suspected, even if it appeared that no felony had in fact been committed, although it would not in that case justify a private individual. It had been held accordingly, that a constable might justify an arrest in the daytime on a reasonable charge of felony, without a warrant, although a felony had not in fact been committed: *Samuel* v. *Payne*[1]. If the mere assertion of a third person that an individual has committed a felony is sufficient to warrant a constable in apprehending the party charged, *à fortiori* a suspicion formed by the constable on reasonable grounds and arising from the conduct of the suspected person will justify the constable in arresting and detaining him. It has been held also that watchmen and beadles have authority, at common law, to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed: *Lawrence* v. *Hedger*[2]. For the plaintiff it was contended that, as there was no charge of felony made, nor any felony committed, the defendant Philby was not justified in making the arrest in the first instance, and still less were he and the other defendants justified in detaining the plaintiff during the night. The learned judge was of opinion that the arrest and detention were lawful, provided the defendants had reasonable cause to suspect that the plaintiff had committed a felony, and he directed the jury to find a verdict for the defendants, if they thought upon the whole evidence that the defendants had reasonable cause for suspecting the plaintiff of felony. A verdict was found for the defendants, but liberty was

[1] Doug. 358. [2] 3 Taunt. 14.

reserved to the plaintiff to move to enter a verdict for nominal damages, if the Court should be of opinion that the arrest and detention were unlawful.

Gurney now moved to enter a verdict for the plaintiff for nominal damages, on the ground that a constable had no authority without a warrant to apprehend a person unless there was a charge of felony made by a third person, or unless a felony had been committed.

Lord TENTERDEN, C. J.—I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgement most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Rule refused[1].

NOTE.—This protection to a constable is confined to cases of felony. As regards misdemeanours a constable (apart from express statutory power) stands in the same position as a private individual. See *Griffin* v. *Colman* (1859), 4 H. & N. 265; 28 L. J. Ex. 134.—[ED.]

[1] See Hawk. *P. C.*, bk. ii, cc. 12, 13; *Regina* v. *Tooley*, 2 Lord Raym. 1301; 11 *Mod.* 248; 3 *Inst.* 118; and see also a *Treatise on the Office of Constable*, ii. pl. 98, by J. W. Willcock.

MALICIOUS PROSECUTION.

1822. ELSEE *v.* SMITH, 1 Dowl. & Ry. 97.

If a person himself apprehends or causes to be apprehended another, he may be liable in trespass for a false imprisonment; but if he falsely and maliciously and without any probable cause puts the criminal law in motion against another, his liability (if any) is to an action on the case for malicious prosecution.

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ELSEE *v.* SMITH.

THIS was a writ of error from the Common Pleas. The declaration was in *case*. The first count alleged 'that the plaintiff in error went and appeared before a justice of the county of Essex, and falsely, maliciously and without any probable cause, made a complaint on oath, that he had reason to suspect that several trees, or parts of trees, had been stolen from the King's Forest of Hainault, and that they were carried to the premises of John Smith (defendant in error), carpenter, of Chigwell Row, and were there concealed; and that he therefore prayed a search-warrant to examine the premises of him the said John Smith; and that the plaintiff afterwards falsely, &c., caused and procured the said justice to make and grant his warrant in writing, under his hand and seal, directed to the constable of Chigwell and all other officers of the peace, whereby after reciting that the said John Elsee had made oath before the justice that he the said John Elsee had reason to suspect that a quantity of oak timber, the property of his Majesty, had recently been stolen from the King's Forest of Hainault, and that the said timber had been carried to, and was concealed on or near the premises of the said John Smith, the said justice required such constables to search the premises of the said John Smith, and that they should bring the said timber, if so found, before him the said justice, together with the body of him the said John Smith, to be dealt with according to law; and that by virtue and under colour of the said warrant, and under pretence of the execution thereof, the said defendant, together with one J. W., a constable, proceeded to a certain place, near to the premises of the said John Smith, and then and there the said defendant falsely and maliciously, and without any reasonable cause,

pointed out to the said constable certain pieces of wood, then and there lying and being near to the said premises of the said plaintiff, to be oak timber, suspected to be feloniously stolen from the said Forest of Hainault; and the said defendant, under colour and pretence of said warrant, then and there caused and procured the said wood to be seized and taken, and kept for the space of twenty-four hours without any reasonable or probable cause; and the said defendant on the same day wrongfully and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be arrested by his body, and imprisoned and kept for the space of twenty-four hours, and caused and procured him to be conveyed before the justice aforesaid, who having heard all that the said defendant could say or allege touching and concerning the said supposed offence, adjudged and determined that the said plaintiff was not guilty of the said supposed offence; and the said defendant had not further prosecuted, but had deserted and abandoned the said complaint, and the prosecution was wholly ended and determined.'

The second count was more general, alleging 'that the defendant without any reasonable or probable cause whatsoever, charged the plaintiff with a certain offence punishable by law, to wit, that several trees, or parts of trees, severed from the ground, had been feloniously stolen, and that the said plaintiff was guilty of such felony, and upon such charge falsely, &c., caused him to be imprisoned for twenty-four hours.' The defendant pleaded not guilty; and there was a general verdict and judgement for the plaintiff for £760 7*s.* damages and costs.

Assignment of Errors. (1) That it is alleged in the first count of the declaration, that, by the information laid before the justice, the defendant only prayed a search-warrant to examine the premises of the plaintiff, and therefore the defendant is not liable for the imprisonment of the plaintiff under the warrant of the justice; (2) That the cause of action in the said first count mentioned describes too generally the mode by which the defendant charged the plaintiff with the supposed offence; (3) That the mode by which the plaintiff was discharged or acquitted is not stated in the said count, and no legal determination of the complaint against the plaintiff is stated or shown; (4) That the proper remedy is trespass and not case for the supposed causes of action mentioned in

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the declaration; (5) That the complaint alleged in the declaration stated a mere suspicion of felony, and not a positive oath of an actual felony committed; and therefore the justice was not warranted in issuing the warrant in the said declaration mentioned; and if not, then trespass was the proper form of action, if any was sustainable against the defendant, &c.

ABBOTT, C. J.—I am of opinion that the judgement in this case ought to be affirmed. Looking to the whole declaration, the inducement and the matters charged in the conclusion, it appears to me to be very manifest that the plaintiff does not seek damages for the taking of his goods, but he seeks damages for the injury done to his reputation and the imprisonment of his person; and therefore I think the verdict was correctly taken. That disposes of the objection as to the verdict. As to the other, which is the material objection in this case, namely, that this should have been an action of *trespass*, and not of *case*; that is founded on the supposition that the warrant, which the magistrate issued for searching the premises and apprehending the person of the plaintiff was illegal. Now if the warrant be not illegal and void in its form, and be founded on the matter laid before the justice, and as he, as a justice of the Peace, had authority to grant such a warrant, then the present action is proper in its form—for falsely and maliciously causing the magistrate to grant a warrant to do the act complained of. When the matter was laid before the justice, he might lawfully and in due exercise of his authority grant the warrant prayed. What is the charge laid before him? That he 'the said John Elsee had reason to suspect that several trees or parts of trees, had been stolen from the King's Forest of Hainault, and that they were carried to the premises of John Smith, carpenter, of Chigwell Row, and were there concealed.' It has been contended that this would not justify the magistrate in issuing the warrant, which was afterwards issued, because there is no perfect allegation that the offence had been committed, but is only put as matter of suspicion. It appears to me, on the authorities cited, speaking generally of the subject-matter, they do not contradict the opinion I have formed. I am of opinion that upon a representation to a magistrate, that a person has reason to suspect that his property has been stolen, or is concealed in a certain place, the magistrate may lawfully issue his

warrant to search the place, and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search-warrant. Suppose the case of a horse, which has been lost by its owner, and it is found in the possession of another person, the owner in that case might not like to take upon himself to swear that the horse has been stolen; for it may have strayed; but when he finds his horse is concealed in the stable of another person, he may very naturally conclude that it must be stolen, from the circumstance of the concealment; and therefore he may very conscientiously swear that he suspects it to have been stolen. If under such circumstances the magistrate is not authorized in issuing his search-warrant, it might happen in many cases that felonies would go undetected. Therefore, it appears to me, that upon such information the justice has authority to issue his search-warrant; and, if it is wrongfully issued, the party who causes it to be issued must make reparation to the person injured. It being alleged in this declaration that the defendant falsely and maliciously made a charge against the plaintiff, and caused and procured a warrant to be issued, whereby the plaintiff is apprehended and unjustly imprisoned, it seems to me that the action is properly framed in case, and ought not to be trespass.

1822. ELSEE v. SMITH. — Abbott, C.J.

BAYLEY and HOLROYD, JJ., delivered judgement to the same effect. BEST, J., concurred.

1870. AUSTIN *v.* DOWLING, L. R. 5 C. P. 534.

Appeal against a decision of the judge of the Bristol County-court.

1870. AUSTIN v. DOWLING.

The particulars of demand annexed to the plaint-note were as follows:—

The plaintiff sues the defendant for that the defendant on Monday, September 13, 1869, assaulted the plaintiff, and unlawfully and wrongfully and without reasonable or probable cause

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gave him into the custody of a policeman upon a false and unfounded charge of felony, to wit, feloniously breaking and entering into a bedroom at Manor House, in the occupation of the defendant, and caused him to be conveyed to a police-station in such custody, and then and there to be imprisoned for a long space of time, to wit, eighteen hours, whereby the plaintiff has been much damaged: and the plaintiff claims £50.

'Take notice that the plaintiff expressly waives any right or cause of action whatsoever in this or any other court, for any slander, libel, or malicious prosecution, or other action in the nature of libel, slander, or malicious prosecution, arising out of or consequent upon or incident to the said assault and false imprisonment.'

The plaintiff about eighteen months since came to lodge at the house of the defendant. In September, 1869, a considerable sum of money was due from the plaintiff to the defendant for board and lodging; and on the ninth of that month the plaintiff was served with a writ from the Court of Queen's Bench at the suit of the defendant for £90 8*s*. 4*d*., and that amount and costs have been paid; but, on September 13, when the plaintiff quitted the lodgings, there was due from him to the defendant, for board and lodging, a further sum of £3 15*s*.

On September 11, the plaintiff found, on returning to his lodgings in the evening of that day, that the drawers in his bedroom had been emptied, and his private cupboards and the contents removed from his bedroom.

The plaintiff, on September 13, went to the Clifton police-station, and requested the inspector of police to allow a constable to accompany him to the defendant's house, in order that he might possess himself of his property which had been removed as aforesaid, without a breach of the peace. A sergeant of police was sent by the inspector with the plaintiff. Upon the arrival of the plaintiff and the police-sergeant at the defendant's house, the plaintiff demanded his property of the defendant's wife, the defendant himself being absent, and was refused. The plaintiff thereupon went upstairs,—the police-sergeant declining to accompany him,—and with his shoulder and a screwdriver broke open the door of a bedroom in the defendant's house, which was occupied by another lodger.

On his coming downstairs the defendant's wife, at the instance

of the defendant's solicitor, gave the plaintiff in charge for felony, for breaking open the door; and the plaintiff was thereupon taken into custody by the police-sergeant, and walked with him to the Clifton police-station. After their arrival at the station, and when the nature of the charge and the circumstances out of which it arose were stated, the inspector of police disclaimed all responsibility in respect of the charge, and would not have acted or detained the plaintiff in custody unless the charge of felony had been distinctly made by or on the behalf of the defendant, who was then present, and unless the defendant had signed the charge-sheet, whereby the plaintiff was charged with 'feloniously breaking and entering into a bedroom' in the defendant's house. The charge-sheet containing this allegation was accordingly signed by the defendant.

The defendant did not, nor did any one on his behalf, require that the plaintiff should be locked up; but, after the charge had been made and the charge-sheet signed by the defendant, the police, of their own motion, and in the usual course,—the case being one of alleged felony,—locked up the plaintiff, and refused to accept bail, as being beyond their competence, for the plaintiff's appearance before the magistrates on the following morning.

The plaintiff was then locked up through the night; and on September 14 he was brought before the magistrates by and in the custody of the police, upon the charge of felony; but, on the statement of the case on the part of the defendant, the magistrates dismissed the charge, and ordered the plaintiff to be and he was accordingly discharged. The plaintiff was in the custody of the police previously to the charge-sheet being signed by the defendant for about half an hour; and the residue of the plaintiff's imprisonment, being seventeen hours and a half, was subsequent to the signing of the charge-sheet.

The plaintiff's case being closed, the counsel for the defendant, referring to the 58th section of 9 & 10 Vict. c. 95[1], asked the

[1] The proviso in that section is as follows:—'Provided always that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage.'

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judge to nonsuit the plaintiff, on the ground that the plaintiff's case was a case of malicious prosecution, and that, even if there was any evidence which would support an action for false imprisonment, the learned judge could not properly sever the evidence that supported an action for false imprisonment from the evidence which supported a case for malicious prosecution.

The judge, after hearing the counsel for the plaintiff, nonsuited the plaintiff, upon the ground that the evidence which had been produced disclosed and supported a case of malicious prosecution, and held that he therefore had no jurisdiction. He also ruled that, although there was evidence in support of a case of false imprisonment, inasmuch as the plaintiff was given into the custody of the sergeant of police by the defendant's wife, and so continued in the custody of the police up to the time when the charge-sheet was signed by the defendant; yet that he ought not, having regard to the particulars of demand, and as the jury had heard all the evidence, and as the imprisonment before and the imprisonment after the charge-sheet was signed were substantially parts of one and the same continuous transaction, to sever the evidence which supported a case of false imprisonment from the evidence which supported a case of malicious prosecution.

The grounds of appeal were: (1) That the judge was wrong in point of law in holding that he had no jurisdiction to hear or try the cause; but that, on the contrary, he had cognizance thereof wholly or in part, as being in fact and in law an action for false imprisonment: (2) That the judge was wrong in point of law in withdrawing the case from the consideration of the jury and ordering a nonsuit to be entered.

J. F. Norris, for the appellant.—This was essentially a case of false imprisonment: and not of malicious prosecution. The distinction between the two descriptions of action is well pointed out in the opinions of Lords Mansfield and Loughborough in *Johnstone* v. *Sutton*[1].

[WILLES, J., referred to *Grinham* v. *Willey*[2], where the mere act of signing the charge-sheet at the request of the constable was held not sufficient to render the defendant liable for a false imprisonment or malicious prosecution.]

[1] 1 T. R. 493, 544.

[2] 4 H. & N. 496; 28 L. J. (Ex.) 242.

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The plaint here was for false imprisonment only: *Chivers* v. *Savage*[1]; *Brandt* v. *Craddock*[2]; and the judge ought not to have received evidence of malicious prosecution. In *Jones* v. *Currey*[3], the plaint involved a charge of malicious prosecution.

Arundel Rogers, for the respondent.—It is not competent to the judge of the County-court to try an action for malicious prosecution (9 & 10 Vict. c. 96, s. 58): nor was it competent to the plaintiff to waive a part of his cause of action so as to give the Court jurisdiction. It was upon this principle that the Court of Exchequer in *Hunt* v. *North Staffordshire Railway Co.*[4] held that a prohibition was properly issued to restrain a County-court from proceeding on a plaint for the recovery of the costs of a defence before magistrates on a summons for an alleged offence against the bye-laws of a railway company,—it being in substance a plaint for a malicious prosecution.

[WILLES, J.—There can be no malicious prosecution until the parties come before a Court or a judicial officer. In the case last cited the man never was in custody at all; it was malicious prosecution or nothing.]

Signing the charge-sheet was the commencement of a malicious prosecution. At all events, the attendance before the magistrates to support the charge was. And as soon as the evidence which would sustain the charge of malicious prosecution came out, the judge properly nonsuited the plaintiff.

Norris was not called upon to reply.

WILLES, J.—It is clear that there was some evidence of a false imprisonment,—an imprisonment without justification. The defendant's wife took it into her head that she had a right to give the plaintiff into custody because he broke into a room in the house in order to re-possess himself of his own property. In this she was mistaken; for the plaintiff was guilty of nothing felonious or malicious. In *Patrick* v. *Colerick*[5], it was held that a plea to a declaration in trespass for breaking and entering the plaintiff's close, that the defendant, being possessed of certain goods of the plaintiff, without his leave and against his will took the goods and

[1] 5 E. & B. 697; 25 L. J. (Q. B.) 85.
[2] 27 L. J. (Ex.) 314.
[3] 20 L. J. (Q. B.) 438.
[4] 2 H. & N. 451; 26 L. J. (Ex.) 374.
[5] 3 M. & W. 483.

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placed them on the close in the declaration mentioned, wherefore the defendant made fresh pursuit, and entered to retake the goods, was a good plea and a good justification of the entry on the plaintiff's close. The plaintiff, having been so wrongfully given into the custody of a police-constable, was taken to the police-station. But for the subsequent act of the defendant, the plaintiff would not have been detained there. If the defendant had merely signed the charge-sheet, that, according to *Grinham* v. *Willey*[1], would not have amounted to more than making a charge against one already in the custody of a minister of the law who intended to keep him there. But it is found in the case that, though the defendant gave no express direction for the plaintiff's detention, he was expressly told by the inspector on duty that he (the inspector) disclaimed all responsibility in respect of the charge, and that he would have nothing to do with the detention of the plaintiff except on the responsibility of the defendant; and that the inspector would not have kept the plaintiff in custody unless the charge of felony was distinctly made by the defendant. Signing the charge-sheet with that knowledge, therefore, was the doing of an act which caused the plaintiff to be kept in custody. In *West* v. *Smallwood*[2], the defendant having accompanied the constable charged with the execution of a warrant against the plaintiff, and pointed out to him the person to be arrested, this was held to be evidence to go to the jury of a participation in the arrest. The judge of the County-court, therefore, was right in holding that there was evidence in support of a case of false imprisonment. How long did that state of false imprisonment last? So long, of course, as the plaintiff remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought before the judicial officer, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion

[1] 4 H. & N. 496; 28 L. J. (Ex.) 242. [2] 3 M. & W. 418.

and judgement of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connexion between them. It may very well happen in the superior courts, which have jurisdiction over both descriptions of action, where the plaintiff, having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case,—which must be within the memory of all of us,—the judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the magistrate. What did the judge do here? He ruled that, although there was evidence in support of a case of false imprisonment, yet that he ought not, having regard to the particulars of demand, and as the jury had heard all the evidence, and as the imprisonment before and the imprisonment after the charge-sheet was signed were substantially parts of the same continuous transaction, to sever the evidence which supported a case of false imprisonment from the evidence which supported a case of malicious prosecution. The former part of the ruling is quite right: the latter part is wrong in two particulars: in the first place, the judge seems to have thought that there was an inception of the malicious prosecution at the time the charge-sheet was signed; and, in the second place, that the false imprisonment merged in that. But, for the reasons already assigned, it was false imprisonment all through, so long as the matter remained in the hands of the ministerial officer. If it were a ground of nonsuit that, either for want of care on the part of the judge, or the absence of objection on the part of counsel, evidence is let in of a matter which is beyond the jurisdiction of the County-court judge, the number of nonsuits would be greatly increased. The proper course in such a case is, to warn the jury to exclude such evidence from their minds in considering the question of damages. There having been no contingent assessment of damages here, all we can do is to set aside the nonsuit and direct a new trial, with costs.

KEATING, J., concurred, and MONTAGUE SMITH, J., delivered judgement to the same effect.

1883. ABRATH *v.* NORTH-EASTERN RAILWAY COMPANY, L. R. 11 Q. B. D. 440, C.A.

[Affirmed in the House of Lords, 11 App. Cas. 247.]

In an action for malicious prosecution the plaintiff must establish, (1) that he was innocent of the crime of which he was accused, (2) that the defendant instituted the prosecution without reasonable and probable cause, and (3) that the defendant was actuated by malice; and the burden of proof of all these issues is upon the plaintiff.

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Action for malicious prosecution.

At the trial before CAVE, J., and a jury, at the Durham Summer Assizes, 1882, the following material facts were proved in evidence, or admitted:—

On September 10, 1880, a collision occurred at Ferry Hill station, on the defendants' railway, and one M. McMann alleged that he had thereby sustained injuries. McMann was attended by the plaintiff, G. A. Abrath, a doctor of medicine and surgery, and McMann brought an action against the defendants to recover damages. The action by McMann stood for trial at the Northumberland Summer Assizes, 1881, but it was settled by the defendants paying to the plaintiff McMann, £725 damages, and £300 costs.

After the settlement, the directors of the defendants' company received certain information from Rayne, a surgeon, who was the medical adviser of the railway company in reference to accidents, and who was authorized to employ detectives on behalf of the company. The directors thereupon employed a solicitor named Dix, to see certain persons and take their statements. Some of these persons were relatives of McMann, and others were well acquainted with him, and their statements, if true, showed that a fraud had been perpetrated on the defendants; that McMann had not been seriously injured in the collision, that the injuries of which McMann had complained had been wilfully produced by the present plaintiff, Dr. Abrath, with the consent of McMann, for the purpose of getting money from the defendants. These statements were submitted to the directors of the defendants' company, who thereupon ordered that the opinion of counsel should be taken, and counsel advised that there was a good case for prosecuting a charge of conspiracy against McMann and Dr. Abrath, his medical adviser. Two eminent medical men were of opinion that the case of the

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alleged injuries to McMann was an imposture. Thereupon the defendants caused an information to be laid before justices, against the plaintiff, Dr. Abrath, on a charge of conspiracy to cheat and defraud the defendants. He was committed for trial and was tried in January, 1882, and acquitted, the foreman of the jury adding that it was the unanimous wish of the jury that he should leave the Court without a stain upon his character. He thereupon commenced the present action, and at the trial certain witnesses were called who were acquainted with McMann, and gave evidence to show that his injuries were real and not feigned, and these witnesses had not been seen on behalf of the defendants before they instituted proceedings against the plaintiff. It was also shown that the persons on whose statements the directors had ordered the prosecution to be instituted against the plaintiff, were of bad character, and one of them had been convicted several times, and also that their own statements, if true, established that they were accomplices with the plaintiff and McMann in the conspiracy. For the defendants it was not disputed that the plaintiff was innocent of the conspiracy, but it was contended that they were justified in instituting the prosecution upon the faith of the statements laid before the directors.

CAVE, J., in summing up to the jury, told them that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and then proceeded as follows: 'I think the material thing for you to examine about is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then there is another point, and

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that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before magistrates with a case which appears to be good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore, I shall have to ask you that question along with the others, and according as you find one way or the other, then I shall tell you presently, or I shall direct you, whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause, or rather that those two questions should be answered in the affirmative—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices, then I shall tell you, in point of law, that this amounts to reasonable and probable cause, and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion, if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the case which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question, were they in what they did actuated by malice, that is to say, were they actuated by some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law to justice? If you come to the conclusion that they did honestly believe that, then they are entitled again to your verdict, but if you come to the conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict, and then it will become necessary to consider the question of damages.'

The learned judge then commented upon the facts of the case, pointing out that if the injuries to McMann were feigned and produced wilfully, and if his case was one of imposture, the defendants would be compelled to rely upon the evidence of persons who were aware what was going on, and further pointing out that as to the fact of conspiracy the defendants could not expect to obtain the evidence of persons of good character; he then proceeded

as follows: 'Now, gentlemen, these are the circumstances which I think point to the question of reasonable care having been taken, Did they take, or did they not take, reasonable care in informing themselves of the true facts of the case? As I have said just now, the plaintiff has to satisfy you that they did not; if you are satisfied that they did, you ought to answer that question in favour of the defendants. If, however, you are satisfied that they did not take reasonable care, then you must answer it for the plaintiff.'

The learned judge concluded his summing-up as follows: 'The questions which I ask you are these:—First, did the defendants take reasonable care to inform themselves of the true state of the case? Secondly, did they honestly believe the case which they laid before the magistrates? If both questions are answered in the affirmative, that they did take reasonable care, and they honestly believed the case they laid before the magistrates, that is a verdict for the defendants, because, please bear in mind, that it is for the plaintiff to prove that they did not. Then if either question is answered in the negative, that is, if the defendants did not take reasonable care, or if they did not honestly believe the case which they laid before the magistrates, then you must ask yourselves this further question, Were the defendants actuated by any indirect motive in preferring this charge? If they were not, then again your verdict must be for the defendants. If they were, then you must find your verdict for the plaintiff, and then in that case you must ask yourselves what damages you give.'

The jury found, first, that the defendants had taken reasonable care to inform themselves of the true state of the case; and, secondly, that the defendants honestly believed the case which they laid before the magistrates. The jury did not answer the third question. The learned judge held that these findings amounted to a verdict for the defendants, and gave judgement for the defendants.

The plaintiff having obtained in the Queen's Bench Division a rule for a new trial on the ground of misdirection, it was made absolute by GROVE and LOPES, JJ.

The defendants appealed.

BRETT, M.R.—This is an action for malicious prosecution, and

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the alleged offence for which the plaintiff was prosecuted was a conspiracy with a person named McMann to cheat and defraud the defendants. The points, which it is necessary for the plaintiff to substantiate in order to make out his claim, are not really in doubt: they have been decided over and over again, and have been decided for more than one hundred years; it is not enough for the plaintiff to show, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff.

In considering this case, I find great difficulty in expressing myself clearly, and I shall say at the outset that I envy the clearness with which my brother Cave summed up this case to the jury. I wish I could express what I intend to say as clearly and as concisely as he stated this case to the jury. A summing-up in an action for malicious prosecution I have never read which I more admired. In order to establish the plaintiff's claim, I have said that he must make out three propositions; and if he fails in making out any one of them, he fails in proving what is necessary to support his claim. It is admitted that the burden of proof of the whole lies upon the plaintiff, and that the burden of proof of each of the major divisions lies upon him; but it is said that if in any one of those three propositions a minor proposition is raised which must be proved in order to support the proposition in question, then the burden of proof is not upon the plaintiff. Now it seems to me that whenever a claim or defence consists of several necessary parts, he on whom the burden of proof of the whole rests, has also on him the burden of proof of each of those necessary parts. The burden of proof lies on the plaintiff to show that there was an absence of reasonable and probable cause: if in order to show the absence of reasonable and probable cause there are minor questions which it is necessary to determine, it seems to me that the burden of proving each of those minor questions lies upon the plaintiff, just as much

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as the burden of proving the whole does. In order to show that there was an absence of reasonable and probable cause for instituting the prosecution for conspiracy, I cannot doubt that the plaintiff was bound to give some evidence of the circumstances under which the prosecution was instituted, and I wholly differ from the suggestion that it is sufficient for the plaintiff to show that he was innocent of conspiracy, and that in the end there was no substantial ground for charging him with conspiracy. If the plaintiff merely proved that, and gave no evidence of the circumstances under which the prosecution was instituted, it seems that the plaintiff would fail; and a judge could not be asked, without some evidence of the circumstances under which the prosecution was instituted, to say that there was an absence of reasonable and probable cause. The evidence, which is to determine the question whether there was reasonable and probable cause, must consist of the existing facts or the circumstances under which the prosecution was instituted. In the present case, evidence was given of circumstances upon which the learned judge had to determine, whether they amounted to reasonable and probable cause for instituting the prosecution. These facts or circumstances being in evidence, another question of fact arose which it was necessary to determine in order to enable the judge to give his opinion upon all the existing circumstances and facts. That additional question of fact was, whether the defendants had taken reasonable care to inform themselves of the true state of the case. Strong evidence had been given that certain testimony or statements had been laid before those who instituted the prosecution for which the action was brought. If the point whether reasonable care had been taken had not been raised, the judge would not have assumed a want of reasonable care in that respect; it would have been assumed on all sides that reasonable care had been taken. But it signifies not what statements were laid before those who instituted the prosecution, if they received them carelessly, or if they did not take reasonable care to inform themselves of other facts with which they might have made themselves acquainted. It has been decided that the question whether reasonable care has been taken by those who instituted the proceedings, to inform themselves of the true state of the case, must be determined one way or the other, in order to enable the judge to give his opinion. Therefore, it becomes a necessary part of the

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question whether there was an absence of reasonable cause, to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the facts. The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove and disprove it may be given. It is a necessary part of the question whether there was reasonable and probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause. It is one of those facts for which I have tried to find a proper designation, but I have not succeeded in finding one satisfactory to my mind; it may be described as a 'fundamental' fact, in order to try to distinguish it from a fact which is merely evidence of something else. It is a fact which it would be necessary to allege and prove, and it is not merely a fact which is evidence of something which is to be alleged and proved.

Therefore, it is to my mind a fact of which the burden of proof lies upon the person who alleges it, and it falls within the rule which I have stated. The burden of proof of satisfying a jury that there was a want of reasonable care lies upon the plaintiff, because the proof of that want of reasonable care is a necessary part of the larger question, of which the burden of proof lies upon him, namely, that there was a want of reasonable and probable cause to institute the prosecution. It follows, therefore, to my mind, that if the direction of Cave, J., to the jury was simply that it was a necessary part of the question whether there was a want of reasonable and probable cause for instituting the prosecution against the plaintiff, that it should be decided whether reasonable care had been taken by the defendants to inform themselves of the true state of the case, and that the burden of proving that minor proposition, as well as the whole proposition, lay upon the plaintiff, it is a direction which cannot be impeached. This was in substance the direction of Cave, J., and I feel certain that his meaning was understood by the jury.

BOWEN and FRY, L.JJ., delivered judgement to the like effect, and the appeal was dismissed.

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NOTE.—In an action for false imprisonment the burden of proof of the existence of reasonable and probable cause is on the defendant; in an action for malicious prosecution the onus lies upon the plaintiff to prove its non-existence. The reason for this distinction is that any interference with a man's personal liberty is primâ facie wrongful, and therefore has to be justified; but any one is primâ facie entitled merely to set the criminal law in motion.

'Imprisoning is primâ facie a tort; prosecution is not so in itself,' per Alderson, B., in *Panton* v. *Williams*, 2 Q. B. at p. 181; and see per Hawkins, J., in *Hicks* v. *Faulkner*, 8 Q. B. D. at p. 170.

Moreover in an action for false imprisonment, being an action in trespass, it is not necessary for the plaintiff to prove that the defendant was actuated by malice. Indeed in such action evidence of malice would be altogether irrelevant, unless, possibly, to inflame damages (see *Fleweter* v. *Royle* (1808), 1 Camp. 187).—[ED.]

1841. PANTON *v.* WILLIAMS, 2 Q. B. 169 (Ex. Ch.).

In an action for malicious prosecution the question whether there was reasonable and probable cause for the prosecution is one of law for the judge.

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TINDAL, C. J., in this vacation (June 15), delivered the judgement of the Court.

Ann Williams, the plaintiff below, brought her action on the case in the Court of Queen's Bench against Panton, the defendant below, complaining that he had falsely and maliciously, and without any reasonable or probable cause whatsoever, procured her to be indicted for the crime of forgery. The defendant below pleaded the general issue, Not guilty. And, upon the trial before the Lord Chief Justice of that Court, after summing up the evidence, he directed the jury, amongst other things, that, if they thought there was reasonable and probable cause for taking the steps against the plaintiff below, their verdict must be for the defendant; and, also, that it appeared to him that it was not a question of law, in a case of that sort, whether there was reasonable and probable cause, but that it was altogether a question of fact for the jury; that he should act wrong if he were to take the question from their consideration.

To which direction the counsel for the defendant below excepted, and insisted 'that his lordship was bound to state to the jury what facts, if proved, would amount to probable cause, leaving to them

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only the question, whether they believed the evidence adduced in order to prove such facts.' And the counsel then proceeded to state, in his bill of exceptions, certain particular facts which had been proved at the trial, insisting that all the facts together, and each of them separately, constituted probable cause: and the counsel further excepted and objected that the judge 'ought not to leave the question, whether there was or was not probable cause for the prosecution, to the jury as a question for them, and without telling them what would be probable cause.'

Upon this bill of exceptions, we take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge? And we are all of opinion that it is the duty of the judge so to do.

In the more simple cases, where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed, from the time of the earliest authorities, but that such question is purely a question of law to be decided by the judge. In *Coxe* v. *Wirrall*[1] and in *Pain* v. *Rochester*[2], both of which were actions on the case for falsely and maliciously procuring the plaintiff to be indicted for felony, the defendant in each action set forth, in the plea, the facts and circumstances that induced him to indict; and, the plaintiff having in each instance demurred, it was the Court which had to determine as a matter of law, and not the jury as a matter of fact, whether the statement in the plea did or did not form a sufficient excuse. And in the case last referred to the very distinction now under consideration was laid down by the Court, upon the objection, then taken, that the plea amounted to the general issue only; the Court holding it to be a good plea, *per doubt del lay gents*, for that the defendant 'confessed the procurement of the indictment, and avoided it by *matter in law*.' And, although the practice which then obtained

[1] Cro. Jac. 193. [2] Cro. Eliz. 871.

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has been altered for a great length of time, by introducing into the declaration, not only the statement that the charge was false and malicious, but also that it was made without reasonable or probable cause,—and thereby compelling the plaintiff to give some evidence thereof, and enabling the defendant to prove his case under the plea of Not guilty,—yet the rule of law, that this question belongs to the judge only, and not to the jury, is not, by such alteration in pleading, in any way impaired. And, still further, the authorities collected in the case of *Sutton* v. *Johnstone* [1], and the authority of that case itself, and also the decision of Buller, J., there cited [2], prove incontestably that it is a question for the jury, whether the facts brought forward in evidence be true or not; but that what is reasonable or probable cause is matter of law.

There have been some cases in the later books which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury: but, upon further examination, it will be found that, although there had been an apparent, there has been no real, departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question, whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted: again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not: in other cases the inquiry has been, whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But, in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury: so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts; both

[1] 1 T. R. 493. *Johnstone* v. *Sutton*, in error, in *Exch. Ch.* 1 T. R. 510; *Sutton* v. *Johnstone*, in *Dom. Proc.* 1 T. R. 784, and 1 Br. P. C. 76 (second edition).

[2] *Candell* v. *London*, cited 1 T. R. 520.

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which investigations fall within the legitimate province of the jury, whilst, at the same time, they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse.

And, such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable: and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them.

Upon the whole, as the question both of law and of fact was left in this case entirely to the jury, we think the exception must be allowed, and that there must be a *venire de novo*.

Venire de novo awarded.

1867. BASÉBÉ *v.* MATTHEWS, L. R. 2 C. P. 684.

In an action for malicious prosecution it is essential for the plaintiff to prove that the proceedings in respect of which the action is brought have been determined in his favour.

1867. BASÉBÉ v. MATTHEWS.

The declaration stated that the defendant Ellen falsely and maliciously, and without reasonable and probable cause, appeared before a justice of the peace, and charged the plaintiff with assaulting and beating her, contrary to the statute, and by false, scandalous, and malicious statements then made by the said Ellen before the justice, and without any reasonable and probable cause, caused the justice wrongfully to convict the plaintiff of the supposed offence, and to adjudge that he should pay a fine of 40*s.*, and £1 5*s.* 6*d.* for costs, which said fine and costs the plaintiff was compelled to pay, *there being no appeal from the said conviction*; and that, by reason of the premises, the plaintiff had been injured in his reputation, and put to expense, &c.

Demurrer, on the ground that no action lies for a malicious prosecution, unless the prosecution has failed. Joinder.

Berresford appeared to support the demurrer, but the Court called upon C. C. Wood to support the declaration.

[Keating, J., referred to *Gilding* v. *Eyre*[1], where, in an action for wrongfully and maliciously and without reasonable and probable cause procuring the arrest of the plaintiff for a larger sum than was due upon the judgement, it was held not to be necessary for the plaintiff to allege that he had obtained his discharge by order of a judge, so as to show that the proceedings had terminated in his favour.]

In *Churchill* v. *Siggers*[2], which was a similar action, Lord Campbell, C. J., says: 'To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss, which is the foundation of an action on the case. Process of execution on a judgement seeking to obtain satisfaction for the sum recovered is prima facie lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgement had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgement. *Without malice and the want of probable cause,* the only remedy for the judgement debtor is to apply to the Court or a judge that he may be discharged, and that satisfaction may be entered upon payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action when his person or his goods have been taken in execution for a larger sum than remained due on the judgement, this having been done by the creditor maliciously and without reasonable or probable cause; i.e. the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor.' That reasoning is precisely applicable here. In *Fitzjohn* v. *Mackinder*[3] the opinion of Willes, J., is strong to show that, if the proceeding be malicious and false,

[1] 10 C. B. (N. S.) 592; 31 L. J. (C. P.) 174.
[2] 3 E. & B. 929, 937; 23 L. J. (Q. B.) 308.
[3] 8 C. B. (N. S.) 78; 29 L. J. (C. P.) 167. In error, 9 C. B. (N. S.) 505.

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so that the conviction is obtained by means of a fraud upon the Court, the mere fact of its remaining unreversed, the plaintiff having no means of calling it in question, will not be held conclusive evidence of probable cause. The observations of the judges in *Steward* v. *Gromett*[1] are also strongly in favour of the view now presented. Williams, J., says: 'In the case of the exhibiting of articles of the peace,—which it seems to me is strictly analogous to the less formal proceeding before the magistrates out of sessions,—the authorities show that the matter could not terminate in favour of the plaintiff, because he is not at liberty to controvert the statement made against him; and therefore it is impossible to say that the existence of the proceedings, and the fact that they have not terminated favourably to the plaintiff, is any evidence that there was reasonable or probable cause for instituting them.' In *Venafra* v. *Johnson*[2] there was no allegation that the conviction had been set aside.

[MONTAGUE SMITH, J.—In the notes to *Ashby* v. *White*, in 1 Smith's Leading Cases, sixth edition, 258, it is said that 'an unreversed judgement raises a necessary presumption that the proceedings to obtain it were instituted with reasonable and probable cause.']

BYLES, J.—I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgement it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg* v. *Blake*[3], where Hale, C. J., says, that, 'if such an action should be allowed,'—that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgement of the proper Court,—'the judgement would be blowed off by a side-wind.'

KEATING, J.—I am entirely of the same opinion.

MONTAGUE SMITH, J.—I am of the same opinion. In *Castrique*

[1] 7 C. B. (N. S.) 191, 206; 29 L. J. (C. P.) 170, 175.
[2] 10 Bing. 301.
[3] Hardr. 194.

v. *Behrens*[1], which was an action for conspiring with certain persons fraudulently and unlawfully to procure an attachment and condemnation of a ship by a proceeding *in rem* in a foreign court, Crompton, J., in delivering the judgement of the Court, says: 'There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause, setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so, without actual legal damage: *Cotterell* v. *Jones*[2]; *Barber* v. *Lissiter*[3]. But, in such an action, it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause.' The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a court of appeal in a matter in which the legislature has thought fit to declare that there shall be no appeal. It was intended that the decision of the magistrate in a case of this sort should be final. It cannot be impeached in an action.

Judgement for the defendants.

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BASÉBÉ v. MATTHEWS. — Montague Smith, J.

1883. THE QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY *v.* EYRE, L. R. 11 Q. B. D. 674 (C. A.).

In an action for malicious prosecution of proceedings other than criminal proceedings special damage must be proved in order to sustain the action, unless the proceedings are such as from their very nature are calculated to injure the credit of the plaintiff.

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BRETT, M. R.—This action, which was tried before Stephen, J., has been brought against the defendant on the ground that he

[1] 3 E. & E. 709, 721; 30 L. J. (Q. B.) 163, 168.
[2] 11 C. B. 713. [3] 7 C. B. (N. S.) 175; 29 L. J. (C. P.) 161.

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falsely and maliciously and without reasonable or probable cause presented a petition for the winding-up of the plaintiff company. At the trial the only evidence given of pecuniary damage was that the plaintiff company upon the hearing of that petition, had been put to extra costs. Thereupon the learned judge, without giving a decision upon the other points of the case, directed a nonsuit, upon the ground that in order to maintain an action of this kind special damage must be shown, and that the fact of being obliged to pay extra costs was not special damage, and, therefore, that the action would not lie. To that ruling the plaintiff company objected; however, upon an application for a rule for a new trial to the Queen's Bench Division, the learned judges agreed with Stephen, J., but solely because they were of opinion that the case was governed by *Cotterell* v. *Jones*[1]; they therefore gave judgement upon the same ground as Stephen, J., without expressly deciding the other points. A rule for a new trial having been granted in this Court, cause has been shown with great ability and great care. I assent to the suggestion, that even although we may disagree with the reasons for the decision of Stephen, J., nevertheless his judgement must stand good if it can be supported upon other grounds. We must, therefore, consider all the points urged before us.

The first question to which I shall refer is whether an action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition to wind-up a company, although the company has suffered no pecuniary damage besides the payment of extra costs. I entirely agree that even although civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice. The present action is in tort, and in order to support it the plaintiff company must have sustained some damage such as the law takes notice of. I assent to the objection taken by the defendant's counsel that the obligation to pay extra costs is not damage of that kind. The theory of extra costs is that they are not necessary to the purposes of the party who has incurred them. When the costs are taxed as against the losing party in the litigation, he is bound to pay only what are called technically 'the costs between party

[1] 11 C. B. 713; 21 L. J. (C. P.) 2.

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and party'; and the successful party is left to pay what are called technically 'the extra costs.' The theory is that the costs which the losing party is bound to pay, are all that were necessarily incurred by the successful party in the litigation, and that it is right to compel him to pay those costs because they have been caused by his unjust litigation; but that those which are called 'extra costs,' not being necessarily incurred by the successful party in order to maintain his case, are not incurred by reason of the unjust litigation. It may be quite reasonable as between the successful party and his solicitor that the 'extra costs' should be paid to that solicitor; but it is unreasonable that the losing party should pay them, they not having been caused by his litigation. If this be taken to be the reason why 'extra costs' are not allowed upon taxation, it is obviously immaterial whether or not the litigation was false and malicious and without reasonable or probable cause; the 'extra costs' are not damage caused by the unjust litigation, and therefore they are not damage for which an action will lie.

When we look back to the decisions of the judges of earlier times (which decisions are to my mind the best guides for judges of the present day), we find it laid down by Holt, C. J., in *Savile* v. *Roberts*[1], that there are three heads of damage which will support an action for malicious prosecution. There is damage to a man's person, as when he is taken into custody, whether that be, as in former times, upon mesne process or upon final process, or whether it be upon a criminal charge. To take away a man's liberty is damage, of which the law will take notice. Secondly, to cause a man to be put to expense is damage, of which the law will take notice. But Holt, C. J., adds a third head of damage, and that is where a man's fair fame and credit are injured. This is also a head of damage of which the law will take notice. Under the old law as to bankruptcy it was held that where a man was falsely and maliciously and without reasonable or probable cause made a bankrupt, two kinds of legal injury were inflicted upon him: first, in order to get rid of the bankruptcy, he was obliged to incur expense, and that was an injury; secondly, it was held that to allege of a trader that he was insolvent and liable to be made a bankrupt, was injury to his fair fame and credit, of which the law would take notice. Therefore under the old system of bankruptcy a trader had a good cause

[1] 1 Ld. Raym. 374.

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of action, if he was made a bankrupt falsely and maliciously and without reasonable or probable cause. In *Johnson* v. *Emerson*[1] it was suggested by Martin, B., that under the present law as to bankruptcy an action could not be maintained for falsely and maliciously and without reasonable or probable cause procuring an adjudication in bankruptcy, because under the Bankruptcy Act, 1869, the proceedings commenced by a petition for adjudication of which the alleged insolvent may get rid, and upon which the Court is to act, and the adjudication will not be made unless the Court is advised that the petition is well founded, and further, because a wrongful adjudication can be obtained only by an erroneous decision of the Court, and a party to the proceedings cannot be held liable for the erroneous decision of the Court, unless he has procured it by fraud and perjury, for which he may be held criminally responsible and accordingly punished. This is in substance the view suggested by Martin, B., but it was not adopted by the other judges of the Court of Exchequer, and I think that it cannot be maintained. The fault of the proposition involved in this view is that it is too large. The proposition is that an action cannot be maintained because the petitioning creditor merely asks the Court to act judicially, and because it was to be assumed that the Court would decide rightly. If that proposition were well founded, it would be an answer to an action for malicious prosecution on a criminal charge, because even in that case the prosecutor merely asks the tribunal to decide upon the guilt of the person whom he charges. If a man is summoned before a justice of the peace falsely and maliciously and without reasonable or probable cause, he will be put to expense in defending himself, and his fair fame may suffer from the accusation: nevertheless, the prosecutor only asks the justice to adjudicate upon the charge. Therefore it is not a good answer to an action for maliciously procuring an adjudication in bankruptcy to say, that the alleged creditor has only asked for a judicial decision. It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act, 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer

[1] L. R. 6 Ex. 329, at pp. 372, 373, 379, 380.

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a pecuniary loss. That seems to be the ground upon which Cleasby, B., supported the action in *Johnson* v. *Emerson*[1], and I think that his view was right. By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act, 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.

The present case, therefore, is reduced to this question, namely, Is a petition to wind-up a company more like an action charging fraud or more like a bankruptcy petition? In my opinion it is more like a bankruptcy petition, and the very touchstone of this point is that the petition to wind-up is by force of law made public before the company can defend itself against the imputations made against it; for the petitioner is bound to publicly advertise the petition seven days before it is to be heard and adjudicated upon: General Order, November, 1862, under the Companies Act, 1862, rule 2. Therefore, I venture to differ from the judges of the Queen's Bench Division in their decision that this case is to be governed by the rule applicable to an action, and I differ from them when they held, as in effect they must be assumed to have done, that although a petition to wind-up a trading company be presented falsely and maliciously and without reasonable or probable cause, an action will not lie; I think that under those circumstances an action will lie.

. . . . . .

Therefore I cannot agree with Stephen, J. It may be that the House of Lords will agree with him and will say that he was right; but as at present advised, I do not agree with him that in this case he could direct a nonsuit. Of course I cannot say that we have the materials before us on which we can enter final judgement; and the result is, that in my opinion there must be a new trial.

BOWEN, L. J.—I am of the same opinion, and, notwithstanding the importance of this case, I should not have added any words of my own to what has fallen from the Master of the Rolls, if it had

[1] L. R. 6 Ex. 329, at p. 340.

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not been more respectful, as we are overruling the opinion of more than one judge of great experience and ability, to give shortly the reasons why I think that there should be a new trial.

The plaintiff company complains that the defendant falsely and maliciously presented a petition to wind it up. When the action came on to be tried before Stephen, J., at the conclusion of the plaintiff's case the learned judge nonsuited the company, on the ground that if the action would lie under any circumstances, at all events it would not lie without proof of special damage. Without actually deciding the point, he expressed an opinion that the plaintiff company had failed to make out malice or a want of reasonable or probable cause, and the burden of proving each of these elements in the case lay on the company. He thought that the defendant had pointed out a fatal blot in the company's case by reason of a failure to show such special damage as would maintain the action.

The first question to be considered is, whether an action will lie for falsely and maliciously presenting a petition to wind-up a company; and the second is, whether an action will lie without further proof of special damage than was presented to the judge in this case. I think that both the questions can be answered at once because, as it seems to me, the discussion which exhausts the one, presents the materials for determining the other. I start with this, that at the present day the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action. To speak broadly, and without travelling into every corner of the law, whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious legal proceedings have been accompanied by damage express or implied. The reason why, to my mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the

doctrine laid down by Holt, C. J., in *Savile* v. *Roberts*[1]. He there said that there were three sorts of damage, any one of which would be sufficient to support an action for malicious prosecution. '(1) The damage to a man's fame, as if the matter whereof he is accused be scandalous. And this was the ground of the case between Sir Andrew Henley and Dr. Burstall: Raym. 180. . . . (2) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action. . . . (3) The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property, and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself.' It is clear that Holt, C. J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared: if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action. Apply the second head of damage, namely, those injuries which are done to the person: the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person. The third sort of damage, the existence of which will support such an action as this,

[1] 1 Ld. Raym. 374, at p. 378.

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is damage to a man's property. The same observation applies to this third head of damage. The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognizes, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. I do not say that if one travels into the past and looks through the cases cited to us, one will not find scattered observations and even scattered cases which seem to show that in other days, under other systems of procedure and law, in which the consequences of actions were different from those of the present day, it was supposed that there might be some kind of action which, if it were brought maliciously and unreasonably, might subsequently give rise to an action for malicious prosecution. It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause. And although every judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past, and the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the counsel for the plaintiff company have put forward.

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But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings of that kind have been taken falsely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy. Such proceedings are indictments—I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution.

But there are other proceedings which necessarily involve damage, such as the presentation of a bankruptcy petition against a trader. In the past, when a trader's property was touched by making him a bankrupt in the first instance, and he was left to get rid of the misfortune as best he could, of course he suffered a direct injury as to his property. But a trader's credit seems to me to be as valuable as his property, and the present proceedings in bankruptcy, although they are dissimilar to proceedings in bankruptcy under former Acts, resemble them in this, that they strike home at a man's credit, and therefore I think the view of those judges correct who held, in *Johnson* v. *Emerson*[1], that the false and malicious presentation, without reasonable and probable cause, of a bankruptcy petition against a trader, under the Bankruptcy Act, 1869, gave rise to an action for malicious prosecution.

I wish to suggest an analogy, not with the view of laying down any principle of law, but rather because it is a matter which may throw light on what I have been saying, and nothing which has fallen from the Master of the Rolls leads me to suppose that anything which I am about to say is contrary to what he thinks. In my opinion some, though perhaps not a perfect, analogy may be found in the law of libel and slander. The essence of the law as

[1] L. R. 6 Ex. 329.

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to libel and slander is that the words must be published falsely and maliciously. With regard to written words or libel, the law does not require proof of special damage, but with regard to some kinds of slander or words spoken the law is different. I am aware that the point is controverted, and that it has never been exactly settled why this difference exists; but it does exist, and it is remarkable that the cases in which words spoken are actionable, are either those where damage has been actually sustained, or where the damage is of such a kind as to be involved in the slander itself, that is to say, to be the natural and necessary consequence of the words spoken, as, for example, when the slander charges that a man has been guilty of an indictable offence which is criminal and scandalous in its character, and involves the loss of liberty or fair fame. What other slanders are actionable? Those which impute to a man a disease necessarily rendering him unfit for society, and those which touch a man in his trade or profession. Put those two classes together—the class of malicious prosecutions which the law recognizes and the class of slanders which the law recognizes—and although the two may not be based on exactly the same principles, perhaps a student may find material for pursuing the analogy between them.

In the present instance we have to consider whether a petition to wind-up a company falls upon the one side of the line or the other—whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind-up a company can be presented and advertised in the newspapers without striking a blow at its credit. I suppose that most of the lawyers of the present day have seen a great increase of three kinds of abuses, all of which are indulged in for the purpose of extorting the payment of some debt, which ought to be the subject of some civil redress. There is the abuse of the police courts when their process is used to extort money; there is the abuse of the bankruptcy law; and there is the abuse of the provisions in the Companies Act, 1862, for winding-up companies. In all these three forms of abuse the aim is to wreck credit, and I should be sorry to think that since they all involve a blow at the credit of those against whom they are

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instituted, the law did not afterwards place in the hands of the injured and aggrieved persons who have been wrongfully assailed, a means of righting themselves and recouping themselves, as far as can be, for the mischief done to them. I therefore answer the two first questions—whether this action will lie, and whether it will lie without further proof of special damage—in the following manner: I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which *ex hypothesi* are unjust and without reasonable or probable cause) for the purpose of winding-up a going company. . . .

Rule absolute.

MAINTENANCE.

1883. BRADLAUGH *v.* NEWDEGATE, L. R. 11 Q. B. D. 1.

To assist a person in litigation in which you have no common interest amounts to maintenance and is actionable.

'Common interest' for this purpose includes a valuable interest in the subject-matter of the suit or an interest arising either from relationship to the suitor or from motives of charity.

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BRADLAUGH *v.* NEWDEGATE.

April 23. LORD COLERIDGE, C. J.—This action was heard before me on March 9 and 17 in this year. The facts upon which the action was grounded, if the action would lie, were undisputed; the principle upon which the damages, if any, were to be calculated was in like manner agreed to. The jury were accordingly discharged. The facts and arguments in the case were proved and heard before me alone, and I am now to deliver judgement. My judgement is, as I was informed, to be appealed from, and I was therefore inclined to send the respondent, whoever he might be, to the Court of Appeal unweighted by any reasons of mine. But, as the subject of the action is not common, and the authorities which deal with it are not familiar to every one, I have thought it best upon the whole to state not only my judgement but the grounds of it.

The plaintiff and defendant are both members of the House of Commons, and the plaintiff had voted in the House of Commons and sat there during a debate after the Speaker had been chosen without having made and subscribed the oath appointed by 29 & 30 Vict. c. 19, s. 5. The defendant appears to have been anxious to sue the plaintiff for the penalty of £500 which is imposed by the section I have quoted, and to which under the circumstances the plaintiff had become subject. He went at once to his own solicitor's office, in Gray's Inn Square, and what took place I will state in the words of that gentleman, who was examined as a witness before me. 'In June, 1880, I remember Mr. Newdegate coming to my office. It was late in the day. Before this day he had told me that he anticipated Mr. Bradlaugh would apply to take his oath and

his seat; that, if he voted without taking the oath, he would be liable to the penalty; but that he was himself prevented by the forms of the House from bringing an action in his own name' a complete mistake I may observe in passing 'and therefore he must find some one who would bring it. On the day in June I speak of Mr. Newdegate came in a great hurry: he said Bradlaugh had taken his seat and voted, and that the writ must be sealed and served at once.'

So far is the evidence of Mr. Stuart, the solicitor.

Mr. Clarke, who was the plaintiff in the action which was brought against Mr. Bradlaugh for the penalty, was also called; and his evidence, so far as it is material to the present question, was as follows:—'I first heard of Bradlaugh having incurred the penalty some time in June, 1880. I happened to be at Mr. Stuart's on business, and I heard of it in conversation with him. I believe it was on that occasion that I gave my consent to the issue of the writ in my name. I don't know who asked me, but I don't deny that I was asked. I may have given my consent without being asked, but I do not say I did. I knew a writ entailed costs. I quite appreciated the consequences of this action. I never could have pretended to pay the costs in this action. I had no means whatever to pay the costs. I gave Mr. Stuart no undertaking to pay the costs. I gave him no written instructions. I think there was no discussion as to the payment of costs between me and Mr. Stuart. I said I must be indemnified against the payment of costs. I don't know whether I said this at the first interview or later in the day; but it must have been just after I consented to let my name be used as plaintiff. I should not have brought the action without the indemnity. Mr. Stuart must have said he would get me one. He may have mentioned Mr. Newdegate's name. Very likely he did mention from whom he was going to get the indemnity. Mr. Stuart was then acting for Mr. Newdegate to my knowledge. In the result I got the bond which has been read in Court this morning. But for that bond I should certainly not have allowed the action to go on.' So far Mr. Clarke.

The bond was before me; it was dated July 14, 1880; and so far as is material was as follows. It declared Mr. Newdegate to be 'held and firmly bound to the said Clarke in all sums of money, costs, charges, and expenses which the said Clarke has already paid

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Coleridge, C. J.

or incurred, or is become liable to pay, or shall hereafter pay, incur, or become liable to pay in and about the prosecution of the said action or in anywise relating thereto, and which the sum or sums of money (if any) which may be recovered by or ordered to be paid to the said Clarke in the said action, either in respect of the penalty sued for in the said action or for costs, shall be insufficient to discharge, and whether such sum or sums of money, costs, charges, and expenses which shall be so paid or incurred by the said Clarke shall be paid or incurred by him or in his behalf in the prosecution of the said action, or shall be ordered to be paid by him to the defendant in the said action or otherwise.' Such in its material substance is the bond.

A fact must now be added which, when the case was heard before me, might perhaps have been anticipated but had not happened; the reversal by the House of Lords of the judgement given against Mr. Bradlaugh by the Court of Appeal in the case of *Clarke* v. *Bradlaugh*. The House of Lords dismissed Mr. Clarke's action with costs, on the ground that he, according to the words of the Lord Chancellor, 'has not any right to or interest in' the penalty he sued for. If he had not, it seems to follow that neither had Mr. Newdegate.

The action now before me is brought by Mr. Bradlaugh against Mr. Newdegate because he (I omit the vituperative adverbs) upheld and maintained the action on the part of Mr. Clarke against the now plaintiff Mr. Bradlaugh. Two questions arise—(1) Will the action lie? (2) If it will, what in the present state of things are the damages?

Mr. Newdegate was not called to deny or qualify the statements made by his own solicitor and by the person to whom he gave his bond of indemnity. It is proved that the action was in truth Mr. Newdegate's action; that Mr. Clarke was a man of straw, quite unable to pay costs which in case of failure must be heavy; that he never dreamed of paying costs; and that he never would have dreamed of bringing the action at all, if Mr. Newdegate had not put him forward and indemnified him against all consequences of bringing it. Mr. Newdegate's bond is no doubt binding as between himself and Mr. Clarke, but it is only binding at Mr. Clarke's option, and if Mr. Clarke chooses to put it in suit. Mr. Bradlaugh's admission to the House of Commons, however, is

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a question in which a large number of persons have persuaded themselves that religion is involved; no one the least acquainted with human affairs but must have seen again and again the strange obliquities of which men, absolutely honourable in all other matters, will be guilty in what they think defence of what they think religion; and suppose Mr. Clarke, the man of straw, is content to become bankrupt and be ruined himself, while he half ruins Mr. Bradlaugh, what redress has Mr. Bradlaugh? He cannot himself sue on a bond to which he is no party, he cannot sue in Mr. Clarke's name nor compel Mr. Clarke to sue, for his benefit, in his own. It is probable, indeed, that by the agency of the Court of Bankruptcy this bond of Mr. Newdegate could be realized as an asset; and there are, I know, authorities which show that, under certain circumstances, this could be done. But it would be a remedy troublesome and expensive and after all not absolutely certain. How the facts may turn out in the result it is, I think, immaterial to inquire. The first question is, Will the action lie? and that must be determined by the legal relations existing between and the legal liabilities *inter se* of the parties to it. There are many definitions of maintenance, all seeming to express the same idea. Blackstone calls it 'an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it' (Bl. *Comm.* bk. iv, c. 10, s. 12). 'Maintenance,' says Lord Coke, 'signifieth in law a taking in hand, bearing up, or upholding of a quarrel, or side, to the disturbance or hindrance of common right' (Co. *Litt.* 368 b). These definitions are repeated in substance in Bacon's *Abridgement*, in Viner, and in Comyns, under the head of maintenance. To the same effect, though somewhat differing in words, is the language of Lord Coke in the Second Institute in his commentary on the Statute of Westminster the First, c. 28. There is, perhaps, the fullest and completest of all to be found in *Termes de la Ley*, 'Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance.' Chancellor Kent, adopting Blackstone's definition, which definition itself is founded on a passage in Hawkins, says that it is 'a principle common to

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the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce' (part vi, lect. 67). I quote from the excellent edition of Kent's *Commentaries*, published by Mr. O. W. Holmes at Boston in 1873. To the same effect is another American authority, Mr. Story. 'Maintenance is the officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it' (*Story on Contract*, ch. vii, s. 578). Jacob's *Law Dictionary* is to the same effect as the other authorities I have quoted.

I have been thus full in my citation of authorities, because I conceive it to be important to keep in view the original idea conveyed by the word in order to see whether modern authority has qualified or altered it, and to interpret the phraseology of modern decisions by principles which the judges who pronounced those decisions would undoubtedly have recognized. And it seems to me that, unless maintenance is to be struck out of digests and law dictionaries for the future, it is impossible to avoid the conclusion that Mr. Newdegate has been guilty of it. If this is to be done, it must be done by some higher authority. I have not the power, and, if I had, I have not the wish, to abolish an action which may be in some cases the only way of redressing very cruel wrongs. I do not in the least say that Mr. Newdegate deserves the stronger language in which Knight Bruce, L. J., describes what he calls 'breed-bates and barretors,' and which will be found by any one, who desires to combine amusement with instruction, and to read good law in racy language, in the judgement in *Reynell* v. *Sprye*[1]. But undoubtedly he drove on to sue Mr. Bradlaugh for a penalty, and he supported and maintained in involving Mr. Bradlaugh in protracted and expensive litigation, a man who admitted he would never have brought the action but for Mr. Newdegate, who would never have gone on with it but for Mr. Newdegate's bond, and who could himself pay no costs if he failed in his action.

What is the state of the authorities on this subject? It is not useful to go very far back, because no doubt things were held to be maintenance some centuries ago which would not be held to be

[1] 1 De G. M. & G. 656, 680.

maintenance now. It may be that the danger of the oppression of poor men by rich men, through the means of legal proceedings, was great and pressing; so that the judges of those days, wisely according to the facts of those days, took strict views on the subject of maintenance. I do not pretend to the historical knowledge which would enable me to say with certainty whether or no this was so: at least it is very possible. But the earliest case to which I think it useful to refer is that of *Wallis* v. *Duke of Portland*[1]. That was decided by Lord Loughborough in 1797. He refused discovery to the plaintiff, on the express ground that, as it was sought to discover an agreement between the Duke of Portland and Mr. Tierney to join in the expenses of an election petition against the return of a Mr. Jackson, it was asking the Duke of Portland to discover what, if discovered, would be maintenance. The case was appealed to the House of Lords, and is to be found in the supplemental volume of Brown's *Parliamentary Cases*, p. 161. Lord Loughborough's decree was affirmed 'principally,' as the head-note states (in Brown the judgements do not appear at length), 'on the ground that the transaction amounted to maintenance at the common law.' Lord Loughborough and Lord Kenyon appear from the journals of the House of Lords to have been present in the House on this occasion. Lord Walsingham was also present; but I was in error on the argument in stating that he had been Chief Justice of the Common Pleas. Lord Chief Justice De Grey, the first Lord Walsingham, did not survive to 1798. For me, sitting at *nisi prius* and hearing a case on further consideration, this decision of Lord Loughborough affirmed in the House of Lords is a binding authority. In the Law Journal report, and in that only, of *Findon* v. *Parker*[2], to which I shall have presently to advert, Baron Rolfe, afterwards Lord Cranworth, is reported, and no doubt correctly reported, to have interjected the remark that the case of *Wallis* v. *Duke of Portland*[1] had been disapproved of. He does not say where or by whom. If he means by himself, his authority, though not without weight, can hardly, I should suppose, be compared to Lord Loughborough's; and as he was speaking only of the case in Vesey, and seems to have been unaware of the subsequent affirmance of Lord Loughborough's decree by the House

[1] 3 Ves. 494. [2] 11 M. & W. 675; 12 L. J. (Ex.) 444.

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of Lords, it is possible that, had he been aware of it, he would not have dismissed Lord Loughborough with such curt contempt. The interjected remark, I may observe, is not to be found in the report of the case in Meeson and Welsby. The cases of *Sprye* v. *Porter*[1] and *Stanley* v. *Jones*[2] were both of them instances of that head of maintenance which is called champerty, and are important chiefly as showing that neither the Court of Common Pleas in the time of Tindal, C. J., nor the Queen's Bench in the time of Lord Campbell, considered maintenance to be obsolete or exploded.

The case of *Pechell* v. *Watson*[3] is more directly in point. In that case a count, which had been proved in fact, and which charged against the defendants conduct really indistinguishable from the conduct here charged and proved against Mr. Newdegate, was held a good count for maintenance by the Court of Exchequer, consisting of Parke, Alderson, Gurney, and Rolfe, BB. *Pechell* v. *Watson*[3] came to be considered in *Flight* v. *Leman*[4]. Its authority was recognized, but the latter case was decided against the plaintiff, who sued for maintenance, on the ground, I own I should have thought the narrow ground, that to instigate a suit was not maintenance, though to support one already instituted was. But the case of *Flight* v. *Leman*[4] is not in point, because the bond, which is the gravamen of the present plaintiff's complaint, was not given till nearly a month *after* the issuing of the writ and the commencement of the action. I notice in passing the cases of *Burke* v. *Greene*[5] where Lord Manners held that for one first cousin to advance to another sums of money for the recovery of an estate was, to use his words, 'a case of clear and distinct maintenance,' and of *Harrington* v. *Long*[6], in which Sir John Leach, M. R., and Lord Brougham, upon appeal, held that, while the mere assignment of the subject of a suit was not maintenance, yet that it was maintenance to agree to give another the benefit of a suit on condition that he prosecutes it, and that it was properly discouraged because it promotes litigation and leads to oppression. These cases are both recognized in *Hutley* v. *Hutley*[7], which was indeed a case of champerty, but which is important as showing that in 1873

[1] 7 E. & B. 58; 26 L. J. (Q. B.) 64.
[2] 7 Bing. 369.
[3] 8 M. & W. 691.
[4] 4 Q. B. 883.
[5] 2 Ball & Beatty, 517.
[6] 2 M. & K. 590.
[7] L. R. 8 Q. B. 112.

Lord Blackburn, Lush, and Archibald, JJ., conceived the law of maintenance to be an existing law, and one which in a proper case they would enforce.

It results, I conceive, from all these cases, and the number might be largely increased, that to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance; and that for such maintenance an action will lie. It is said, however, that this general statement requires two qualifications: first, that the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive; next, that if he has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so. For the first of these propositions a passage in the judgement of Sir John Coleridge, delivering the opinion of the Judicial Committee in *Fischer* v. *Kamala Naicker*[1], is cited; and for the second the judgements in *Findon* v. *Parker*[2], and the judgements, especially that of Archibald, J., in *Hutley* v. *Hutley*[3]. It is fit I should consider these authorities with the respect that is due to them and which I unfeignedly feel.

If the judgement of the Privy Council had the sense which has been contended for, I at least am not prepared to say that I should hold the conduct or the motives of Mr. Newdegate, as proved before me (and I know nothing but what is proved), to be such as, within the words of that judgement, taken even in the sense contended for, to relieve him from the character of a maintainer. But I am not obliged to give a positive opinion on this point, because I do not think the words can fairly bear the sense ascribed to them. The words are remarkable 'it (i. e., maintenance) must be something against good policy and justice, something tending to promote unnecessary litigation, something that *in a legal sense* is immoral, and to the constitution of which a bad motive *in the same sense* is necessary.' The decision of the House of Lords shows, I think, that Mr. Newdegate's conduct was against good policy and justice, and tended to promote unnecessary litigation—but what is immoral *in a legal sense*? What *in a legal sense* is a bad motive? It is not

[1] 8 Moo. Ind. App. 170, 187. [2] 11 M. & W. 675.
[3] L. R. 8 Q. B. 112.

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perhaps quite easy to say. Yet the language I am quoting is not the language only of the Privy Councillor who delivered judgement, and who, by the course of the Judicial Committee, is by no means certainly the writer of it, but of Lord Kingsdown, of Knight Bruce, L. J., Turner, L. J., Sir Edward Ryan, Sir Lawrence Peel, and Sir James Colvile, a collection of perhaps as great lawyers as in the year 1860 could have been brought together, and who must have intended something by a form of words not usual, and clearly intended to be definite and exact. At least in any view it must mean as much as this, that to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive. In this sense I do not hesitate to call Mr. Newdegate's conduct immoral and his motive bad. The language used is *obiter* only, for the judgement is in an Indian case, holding that the Sudder Adawlut could not decide a case upon the ground of champerty which the pleadings did not raise, but that, if they could, the champerty or maintenance which would invalidate a contract in India must have the qualities attributed to champerty and maintenance by the English law, that is to say—and then follows the passage which I have quoted. *Obiter dictum*, however, or not, I entirely accept it, and intend to decide this case in accordance with its language.

This language was not, I think, intended to turn the Court and the jury into doctors of casuistry, or to embark them in inquiries as to the true character in a court of morals of the conduct or the motive. If the thing done is injurious and unlawful, and if none of those excuses exist which have been held in law to justify the injury or render the act lawful, then the act is and remains unlawful and actionable; and further, as in the absence of evidence to the contrary men are held to intend to do what they do in fact, if the act is one from which in the nature of things injury must follow, the doer will be considered to have intended the injury he has done, and the existence of the *mens rea* will be inferred, so far at least as the inference is necessary to the maintenance of the action.

It is said, however, that the defendant had or believed that he had a common interest with Mr. Clarke in the result of the suit, and that, therefore, his finding Mr. Clarke the whole money for the litigation was not maintenance. As a general rule there is no doubt that such common interest, believed on reasonable grounds

to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. Brooke, Fitzherbert, Rolle, Hawkins, Viner, Comyns, to cite no more, all concur in this. Buller, J., in his celebrated judgement in *Master* v. *Miller* [1] strongly insists upon it. But then the instances they give show the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connexion of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them.

All this is recognized in the judgement of Lord Loughborough already referred to; and it is insisted upon with great force in the case of *Findon* v. *Parker* [2], a case which it is fit, from the reliance which has been placed upon it, that I should carefully examine. It was an action brought by an attorney for his bill of costs; it was brought against the person who had employed him to defend proceedings brought, against himself and a number of other landowners, by Jesus College, Oxford, to enforce payment of tithes for lands, which it was asserted by the defendant and his co-defendants were covered by a *modus*. The defendant pleaded that he, the defendant, had been guilty of maintenance in agreeing with other landowners to resist the claim of the college at their joint expense; and he insisted on his own wrong to escape the payment of his attorney's bill. No wonder that Lord Abinger said, 'If any ground can fairly be suggested for making his contract legal, we ought to adopt it, in favour of the party who makes the defence, in order to acquit him of the imputation which he casts upon himself.' No

[1] 4 T. R. 320. [2] 11 M. & W. 675.

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wonder that Baron Rolfe said, 'The only hesitation I have had in this case has arisen from the fear, lest the indignation I feel against so unrighteous a defence as the present might lead one into bending the law more than ought to be done.' The judges show that there was abundant reason for the landowners to believe that they had a common ground for resisting, and a common interest in resisting, the claim of Jesus College; and they gave judgement for the plaintiff. In the course of Lord Abinger's judgement occurs the well-known passage on which so much stress was laid, and properly laid, in the argument. It has been read so often that I confine myself to referring to it at p. 682. It is full of the strong sense characteristic of Lord Abinger, and I venture to adopt the language of Lord Blackburn in *Hutley* v. *Hutley*[1], and say that I incline to agree with and to adopt every word of it. But it has no application to the case before me; the interest in that case was an interest which the old law would have recognized, as Baron Rolfe expressly points out; and the case affords no ground for saying that the doctrine of maintenance in itself was either obsolete or exploded. Indeed Lord Abinger had expressly upheld it in *Prosser* v. *Edmonds*[2]; and in *Shackell* v. *Rosier*[3], a case in many respects not unlike the present, the Court of Common Pleas refused to enforce a contract of the same sort as that between Mr. Clarke and Mr. Newdegate on the ground that it amounted to maintenance. See particularly the judgements of Tindal, C. J., and Bosanquet, J.[4] What, then, is the common interest which existed here between Mr. Clarke and Mr. Newdegate? There is none, except the interest which all the Queen's subjects have in seeing that the law of the land is respected and the enactments of every Act of Parliament are obeyed. The doctrine of maintenance is not confined to civil actions, and, if this be legal, it will be legal to agree to pay the expenses of any one who will indict another for the misdemeanour of non-compliance with any Act of Parliament. The action here is brought for a penalty of £500, imposed by an Act passed in 1866 upon every member of the House of Peers and every member of the House of Commons, without distinction, who votes or sits during debate in either House without having made and subscribed the oath thereby appointed. In the case of a member of the House of Commons

[1] L. R. 8 Q. B. 112.
[2] 1 Y. & C. 481.
[3] 2 Bing. N. C. 634.
[4] 2 Bing. N. C. 644, 649.

'his seat shall be vacated as if he were dead.' In the case of a peer this consequence was, I presume, thought too severe, and it is omitted, and in this very parliament certain peers who had not complied with the provisions of the statute were relieved from all danger of the penalties by Acts of Indemnity. As to a member of the House of Commons, however, his seat is vacated by the operation of the Act, and the result of any action for the penalty can have no effect therefore upon the constitution of the House itself. The person contravening the Act has ceased to be a member; the action is for a penalty; the result of the action is the recovery or failure to recover £500; in that result it is not suggested that Mr. Newdegate had any interest, it was not argued that he was to share the penalty with the informer, and there is no other interest common to the informer and to him which is not common to him with every subject of the Queen. Indeed, if there had been a bargain, as certainly there was not, to share the penalty if recovered, it would have made the latter more illegal still. 'Do you, a man of straw, sue another for a penalty; I will find all the money, and if you recover the penalty we will share it.' Such a transaction is not only maintenance, but champerty, and, though I need cite no authorities to show that it would be absolutely illegal, I will mention only the great authority of Lord Eldon, who in his judgement in *Wood* v. *Downes*[1] expressly so decides.

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It is true that this action is of the rarest; very few examples of it in any modern books are to be found. As a rule the doctrines and principles applicable to maintenance are discussed and laid down in judgements upon pleas, defences to actions of the more ordinary kinds, in which the defendant has sought to set aside a contract, or to be relieved of an obligation, on the ground that the contract was void or illegal, or the obligation not binding, because founded upon what was, or what savoured of, maintenance. But I think it has been shown, not only from old abridgements and digests and text-writers, but by a chain of authorities from Lord Loughborough and Lord Eldon down to the present time, that the doctrine of maintenance is a living doctrine, and the action of maintenance is one which, in a fit case, the Courts of this day will support. The action of *Pechell* v. *Watson*[2], to which reference has already been made, was such an action. It was an action

[1] 18 Ves. 120

[2] 8 M. & W. 691.

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brought expressly on the ground of maintenance, and the plaintiff recovered large damages. It was tried in 1841, and, as might be expected from the date, many points of pure pleading were raised and decided in it which have not now the importance they had then. But it was not even contended that the action was misconceived; or that if properly stated, and stated by the proper parties, such an action would not lie. The case is an express authority in favour of this kind of action. It is my fortune to have to support it in an action in which the defendant is a man whose character is entitled to great and true respect, and in favour of a plaintiff with whose opinions, openly enough avowed, I have no kind of sympathy. Yet I will not call it an ill-fortune, for many of the most precious judgements which these Courts have ever heard pronounced have been pronounced in favour of persons who, if English justice could ever be swayed by personal feeling, or could for a moment 'hedge aside from the direct forthright,' would assuredly have failed to command success. It *is* an ill-fortune perhaps that to many men, though not to me, the cause of true religion seems to be concerned with the legal success or the legal defeat of a particular person, whose legal success or legal defeat is really to the cause of true religion a matter of supreme indifference, yet in regard to whom (I speak only of what has been proved before me) recourse has been had to proceedings which, with regard to any other accused person, would have been sternly and universally condemned, and of which unhappily in the minds of many men the cause of true religion is burdened with the discredit. My duty, however, is very simple; to decide the case according to the best opinion I can form of the law which I am sitting to dispense, a duty which the elements of Christian teaching make, if not pleasant, at least plain and clear.

Having decided, therefore, as I do, that the action lies, what are the damages? In the argument it was rather assumed that the House of Lords would affirm the judgement of the Court of Appeal, and on that assumption it was conceded that if there were any damages they must be the penalty and all the costs which Mr. Bradlaugh had been put to in resisting its recovery. The House of Lords has relieved him of the penalty and of the party and party costs of the proceedings. But that leaves, I suppose, a considerable sum of money which the conduct of Mr. Newdegate has

compelled him to pay, but which under the rules as to costs he cannot recover from Mr. Clarke. I assume that either Mr. Newdegate will pay without trouble, or that in the way I have pointed out he can be compelled to pay by the Court of Bankruptcy all that Mr. Clarke could be made to pay as costs. For the residue; the costs and expenses to which Mr. Bradlaugh has been put; his own costs as between solicitor and client, and any legal expenses which he has had to bear; for all this I think Mr. Newdegate is liable in damages. I think Mr. Bradlaugh is entitled to an indemnity at Mr. Newdegate's hands for everything which Mr. Newdegate's maintenance of Mr. Clarke has caused him. If this cannot, and probably it cannot, be agreed between the parties, it must go to an official referee to ascertain the amount, and on receipt of his report to me I will give judgement for the amount which he finds to be due, applying to his inquiry the principle I have laid down.

Judgement accordingly.

INJURIES IN FAMILY AND CONTRACTUAL RELATIONS.

SEDUCTION AND LOSS OF SERVICE.

1844. GRINNELL *v.* WELLS, 7 M. & G. 1033.

The foundation of the action to recover damages against a wrongdoer for seduction is based not upon the seduction itself, but upon the loss of service resulting therefrom.

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CASE, for the seduction of the plaintiff's daughter.

The declaration stated that before and at the time of committing the grievances, and from thence until the time of the pregnancy and sickness and of the plaintiff's expending the moneys and incurring the debts, thereinafter mentioned, Alice Grinnell, the daughter of the plaintiff, was a poor person who maintained herself by her labour and personal services, and, except by her labour and personal services, was not of sufficient ability to maintain herself, and was, during all that time, unmarried, and an infant under the age of twenty-one years, to wit, of the age of fourteen years, and at and during and after the time of her pregnancy and sickness, as thereinafter mentioned, and of the plaintiff's expending the moneys, and incurring the debts, thereinafter mentioned, the said Alice was such poor person, infant, and unmarried, and was not of sufficient ability to maintain herself: yet the defendant, well knowing the premises, but contriving to injure the plaintiff, and to compel him to maintain the said Alice, on May 27, 1841, and on divers other days, &c., debauched and carnally knew the said Alice, whereby she became pregnant and sick with child, and so continued for a long time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, &c. the said Alice was delivered of the child with which she was so pregnant as aforesaid; by means of which premises the said Alice, for a long time, to wit, &c. became and was unable to work or to maintain herself, which she might, and otherwise would, have done; and the plaintiff, so being her father, and being of sufficient ability to maintain the said Alice, was, by means of the premises, during all that time, forced and obliged to, and necessarily did, maintain

the said Alice at his own charges; and also by means of the premises, the plaintiff was obliged to, and did necessarily, pay, lay out, and expend divers moneys, and incur divers debts, in the whole amounting to £50, in and about maintaining, nursing, taking care of, and curing the said Alice, and in and about her delivery, during the time she was so unable to maintain herself as aforesaid. Wherefore the plaintiff saith that he is injured and hath damage to the value of £500, &c.

Plea not guilty; whereupon issue was joined.

The cause was first tried before Erskine, J., at the spring assizes at Gloucester in 1843, when a verdict was found for the plaintiff, damages £300. In the following term a rule *nisi* was obtained for a new trial on the ground of excessive damages, the declaration only pointing to expenses actually incurred by the plaintiff in his daughter's maintenance and cure, and upon affidavits impugning the character of the principal witness; and also to arrest the judgement. In Trinity Term the rule was made absolute for a new trial on payment of costs, the defendant agreeing that any damages to be assessed on the second trial, might be estimated agreeably to the principles applicable to ordinary actions for seduction. At the second trial which took place before Williams, J., at the Gloucester summer assizes, 1843, the jury again found a verdict for the plaintiff, damages £200.

Talfourd, Serjt. (with whom was Greaves), in Michaelmas Term, 1843, moved in arrest of judgement.

TINDAL, C. J., now delivered the judgement of the Court. The question in this case arises upon a motion in arrest of judgement, and is this—whether a father can maintain an action upon the case for the seduction of his daughter, where he is unable to allege in the declaration, the loss of her service by reason of the defendant's wrongful act.

The declaration in this case contains no allegation of the loss of the service of the daughter, but instead thereof, alleges that the daughter was a poor person, maintaining herself by her labour and personal services, and not of sufficient ability to maintain herself otherwise; and, after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plain-

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tiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged to, and necessarily did, maintain his said daughter, at his own charges, and did necessarily pay large divers money, and incur divers debts in and about the maintaining and nursing &c. of his said daughter, during the time she was unable to maintain herself. And the question arises—whether the want of the allegation of the loss of service, is supplied by the substitution of the before-recited allegation.

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. Such is the language of Lord Holt in *Russell* v. *Corne*[1], and such the opinion of the Court in the earlier case of *Gray* v. *Jefferies*[2], with reference to an action by a father for a personal injury to a child, which stands precisely on the same footing: see also *Randle* v. *Deane*[3]. It has, therefore, always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail: see *Bennett* v. *Allcott*[4]. It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. This distinction is most clearly and pointedly put by the Court in Robert Mary's case, where it is said, 'If my servant be beaten, the master shall not have an action for this beating, unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action: and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of the service, is the cause of his action.'

No precedent in an action for seduction has been brought before

[1] 2 Ld. Raym. 1031; 6 Mod. 127.
[2] Cro. Eliz. 55.
[3] 2 Lutw. 1497.
[4] 2 T. R. 166.

us (except those in *Harris* v. *Butler*[1] and *Blaymire* v. *Hayley*[2], in both of which cases the declarations were held bad), in which there has not been an allegation of the loss of service to the father: and the struggle has always been at the trial, to give some proof either of actual service or of the implied relation of master and servant. And in the case of *Dean* v. *Peel*[3], where the loss of service was alleged in the declaration, but where the proof at the trial was only this, that the daughter was in the service of another person at the time of the seduction without any intention of returning to her father's house; but that, upon her seduction, she came home and was maintained by her father during her illness, the action was notwithstanding held not to be maintainable. Now, that case is, in evidence, precisely what the present case is in pleading upon the record; and therefore it affords a direct authority for the position, that, where there is the absence of any allegation of the loss of service to the father, although there may be an allegation of his being compelled to pay the expenses arising from the wrongful act, the action is nevertheless not maintainable. Upon the ground of action, therefore, set forth upon this record, we do not feel ourselves warranted in giving judgement for the plaintiff; as we think the declaration discloses no legal wrong to the plaintiff, no invasion or violation of his legal rights.

Many observations suggest themselves against the soundness of the argument upon which the plaintiff relies.

In the first place, if the liability to support the daughter under the statute of Elizabeth, would form a ground of action *per se*, independently of any service, it would seem scarcely credible,—as that statute was passed long before any of the cases above referred to,—that the difficulty of proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered by framing the declaration,—like the present,—upon the legal liability of the father to maintain his daughter under the statute.

In the next place, if this ground of action is available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not: and, upon this supposition, the beating of a son, at whatever advanced age, and although altogether emancipated from his father's family, would

[1] 2 M. & W. 539. [2] 6 M. & W. 55. [3] 5 East, 45.

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form a ground of action at the suit of the father, if called upon, under the statute, to maintain his son.

And, still further, this anomaly would follow, that, as the father is only liable, under the statute, to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father, when he brings the action, are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer orders of the community—a result that would be most unreasonable[1].

We therefore think, for the reasons above given, the cause of action as stated on this record, is insufficient, and that the rule for arresting the judgement must be made absolute.

Rule absolute.

NOTE.—At the common law a husband has a similar right of action against any one who entices away, harbours, injures or debauches his wife *per quod consortium amisit*. The last right, which was enforced by the old action for criminal conversation, has now been converted into a right to obtain damages under the Matrimonial Causes Act, 1857 (see Steph. *Bl.*, fourteenth edition, vol. iii. p. 445).—[ED.]

1867. EVANS *v.* WALTON, L. R. 2 C. P. 615.

Where the relation of master and servant subsists *de facto* an action will lie for enticing away such servant without proof that the defendant debauched her.

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The first count of the declaration stated that Louisa Evans was and still is the servant of the plaintiff in his business of a publican and victualler; and that the defendant, well knowing the same, wrongfully enticed and procured the said Louisa Evans unlawfully and without the consent and against the will of the plaintiff, her said master, to depart from the service of the plaintiff; whereby the plaintiff had lost the service of the said Louisa Evans in his said business.

The second count alleged that Louisa Evans departed from the service of the plaintiff, and that the defendant, well knowing the premises, wrongfully and without the consent and against the will of

[1] It may be observed, however, that the *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers.

the plaintiff, received and harboured and detained her, and refused to deliver her to the plaintiff, although requested by the plaintiff so to do; whereby the plaintiff lost her service in his said business.

Pleas, not guilty, and that Louisa Evans was not the servant of the plaintiff, as alleged. Issue thereon..

The cause was tried before Pigott, B., at the last spring assizes at Oxford. The plaintiff was a licensed victualler in Birmingham, and was assisted in his business by his daughter Louisa, a girl about nineteen years of age, who served in the bar and kept the accounts. On November 10, 1866, the daughter, with her mother's permission, which was procured by means of a fabricated letter purporting to be an invitation to her to spend a few days with a friend at Manchester, left the plaintiff's house and went to a lodging-house in the neighbourhood of Birmingham, where she cohabited with the defendant, at whose dictation the above-mentioned letter had been written. On November 19, the daughter returned home, and resumed her duties for a short time, but ultimately left her home again, and on February 9 was again found cohabiting with the defendant at the same lodging-house.

On the part of the defendant it was submitted that, in order to sustain the action, in the absence of an allegation that the defendant had debauched the plaintiff's daughter, it was necessary to show a binding contract of service.

The learned baron, after consulting Blackburn, J., intimated an opinion that the action would lie upon the declaration as framed; but he reserved to the defendant leave to move to enter a nonsuit if the Court should be of opinion that in point of law the action was not maintainable,—the Court to have power to draw any inferences of fact, and to amend the declaration, if necessary, according to the facts proved.

The case was then left to the jury, who returned a verdict for the plaintiff, damages £50.

Huddleston, Q.C., in Easter Term obtained a rule *nisi*.

Powell, Q.C., and J. O. Griffits (June 11), showed cause, submitting that the action would lie upon the declaration as it stood.

The Court called on

H. James, and Jelf, in support of the rule.—There are two kinds of action for loss of service, viz. an action for the seduction and

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consequent loss of service of a daughter, and an action for enticing away a servant. In order to sustain the first, it is not enough that there has been criminal intercourse, but it must be shown that that intercourse has resulted in pregnancy or other illness, so as to cause a disability in the daughter to perform her accustomed duties: *Eager* v. *Grimwood*[1]; *Boyle* v. *Brandon*[2]; but an actual contract of service need not be proved. It is not suggested that there is any such cause of action here. In *Sedgwick on Damages*[3], it is said that, 'although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover. In other words, without some damage to the plaintiff or master, occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief.' And for this *Eager* v. *Grimwood*[1] is cited.

[BOVILL, C. J.—*Eager* v. *Grimwood*[1] is cited in Smith's *Leading Cases*[4] with evident disapprobation.]

No precedent is to be found without the allegation *per quod servitium amisit*. The action for seduction is an anomalous one.

[WILLES, J.—Upon the first point I think we are bound by the case of *Eager* v. *Grimwood*[1]. The question is whether the action may not be maintained for enticing the girl away from her father's service.]

To sustain an action for enticing away a servant, it is necessary to show a valid and binding contract of service, which has been broken through the procurement of the defendant. Actual service is not enough. Here, there was no contract, express or implied, for the breach of which the father could have sued his daughter. All that the defendant can be charged with having done is, inciting the daughter to do that which in the exercise of her own free will she had an undoubted right to do. If an action would lie for this, it would equally lie for inducing a daughter to quit her father's house for the purpose of marrying her[5]. In *Cox* v. *Muncey*[6] it was held by this Court that no action will lie for enticing away an apprentice, unless there be a valid contract of

[1] Ex. 61.
[2] 13 M. & W. 738.
[3] Second edition, p. 543.
[4] Sixth edition, vol. i. p. 260.
[5] See Fitz. N. B. 90 H.
[6] 6 C. B. (N. S.) 375.

apprenticeship; and the like was held as to a servant by the Court of Queen's Bench in *Sykes* v. *Dixon*[1].

[BOVILL, C. J.—At the end of Lord Denman's judgement in *Sykes* v. *Dixon*[1], there is a remark which seems to be adverse to your view. 'Then,' says his lordship, 'it was argued, on the authority of *Keane* v. *Boycott*[2], that the objection' (that is, to the validity of the contract), 'was not one which a third person could take: and that might be so in a case where the servant was *de facto* continuing in the service; but not here, where he had quitted his master, and taken his chance in hiring himself to the defendant.' Here the daughter was *de facto* continuing in the service of her father when the defendant seduced her therefrom.]

All the authorities were referred to in *Lumley* v. *Gye*[3], and amongst them *Blake* v. *Lanyon*[4]; but in none of them was the action held to lie in the absence of a binding contract of service.

[BOVILL, C. J.—In *Jones* v. *Brown*[5] it was ruled by Lord Kenyon that to maintain an action for assaulting the plaintiff's infant son, *per quod servitium amisit*, proof of his living under his father's roof is sufficient evidence of service. Is there any case where it has been distinctly laid down that there must be something beyond the ordinary contract of service which the law will imply in the case of a son or a daughter?]

Where the action is simply for enticing away from the service, the relation of parent and child is not to be taken into consideration. All the textbooks lay it down generally that there must in such a case be a binding contract: see 3 Bl. *Com.* 142; Smith's *Master and Servant*, second edition, 100; *Addison on Torts*, second edition, 802. A technical objection to the contract has been held to be fatal on various occasions.

BOVILL, C. J.—The rule in this case was granted principally on the contention of the defendant's counsel that, in order to sustain the action, it was necessary to show that there was a binding contract of service between the father and the daughter. And for this proposition various textbooks were referred to, and several cases cited, amongst which was that of *Sykes* v. *Dixon*[1]. But,

[1] 9 Ad. & E. 693; 1 P. & D. 463.
[2] 2 H. Bl. 511.
[3] 2 E. & B. 216; 22 L. J. (Q. B.) 463.
[4] 6 T. R. 221.
[5] Peake, 233 (third edition, p. 306).

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when that case is looked at, I find no such principle involved in the decision. Indeed, in each of the cases, from the form of the declaration, it became necessary to prove some contract for service beyond that which the law would imply from the relation of the parties. No authority is to be found where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved. But there are abundant authorities to show the contrary. It is said that the case of seduction is anomalous in this respect. There is, however, no foundation for that assertion. In the case of an action for the seduction of a daughter, no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family. So, in the case of an action for assaulting the plaintiff's infant son or daughter, no evidence of service is necessary beyond that which the law will imply as between parent and child. In *Barber* v. *Dennis*[1] the widow of a waterman, who, as was said, by the usage of Waterman's Hall may take an apprentice, had her apprentice taken from her and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover. It was agreed that the action would well lie if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master; but it was objected that the company of watermen is a voluntary society, and that being free of it does not make a man free of London, so that the custom of London for persons under one-and-twenty to bind themselves apprentices does not extend to watermen; which was agreed by all. Then it was said that the supposed apprentice here was no legal apprentice if the indentures be not enrolled pursuant to the 5 Eliz. c. 4, and, if he were not a legal apprentice, the plaintiff had no title. But Holt, C. J., said he would understand him an apprentice or servant *de facto*, and that would suffice against them, being wrongdoers. Again, in Fitz. N.B. 91 G, it is laid down that, 'if a man ought to have toll in a fair &c., and his servants are disturbed in gathering the same, he shall have trespass for assault of his servants, and for the loss of their service,' &c. To this is appended a note by Lord Hale: 'Trespass for beating his servants *per quod servitium*

[1] 6 Mod. 69; 1 Salk. 68.

amisit, lies, although he was not retained, but served only at will: 11 H. 4, fo. 2, per Hull, accordant. And so, if A. retains B. to be his servant, who departs into another county, and serves C., A. before any request or seizure cannot beat B.; and, if he does, C. shall have trespass against him (21 H. 6, fo. 9), and recover damages, having regard to the loss of service (22 Ass. 76); and the retainer is traversable: 11 H. 6, fo. 30.' These authorities, and the principle upon which the action for assaulting a servant is founded, would seem to show that an actual binding contract is not necessary. There is no allegation in this declaration of a hiring for any definite time. All that is alleged is, that the girl was the daughter and servant of the plaintiff. It cannot be doubted that the jury would infer from the facts that the relation of master and servant did exist, without any evidence of a contract for a definite time; and, if we are to draw inferences from the facts, I should come to the same conclusion. Then, was that relation put an end to? The service, no doubt, was one which would be determinable at the will of either party, as is said by Bramwell, B., in *Thompson* v. *Ross*[1]. That this kind of service is sufficient, I should gather from the language used by this Court in *Hartley* v. *Cummings*[2], and particularly from the judgement of Maule, J. That was an action for seducing workmen from the service of the plaintiff, a glass and alkali manufacturer, and harbouring them after notice. It appeared that one Pike was in the service of the plaintiff, and the defendant induced him to leave. In giving judgement, Maule, J., says: 'The objection urged on the part of the defendant is, that the agreement entered into by Pike with the plaintiff was one that gave the latter no right to compel Pike to serve him, inasmuch as it was void either for want of mutuality or because it was a contract to an unreasonable extent operating in restraint of trade. On the other side, it was insisted, upon the authority of *Keane* v. *Boycott*[3], that it was quite immaterial, for the purposes of this action, whether the agreement was void or not; for, that it is not competent to the defendants, who are wrongdoers, to take advantage of its invalidity. In answer to this, the case of *Sykes* v. *Dixon*[4] was cited on the part of the defendants, where it is said to have

[1] 5 H. & N. 16, 18; 29 L. J. (Ex.) 1.
[2] 5 C. B. 247.
[3] 2 H. Bl. 511.
[4] 9 Ad. & E. 693; 1 P. & D. 463.

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been decided by the Court of Queen's Bench that such an objection may be set up by a third person not a party to the agreement. It is unnecessary to say whether that case may not be distinguished from the present,—there being no subsisting service that was interrupted by the act of the defendant,—because I am of opinion that in this case there was a contract between Hartley and Pike which was perfectly valid, notwithstanding the objections that have been urged.' Whether or not there was a subsisting service seems to be the test. I think the jury properly assumed that there was a subsisting service here. It is said that the girl's services were not lost to the plaintiff by reason of the defendant's having enticed her away; for that, inasmuch as she afterwards returned to her father's house, the relation of master and servant was not put an end to by any act of the defendant's. I think, however, there was a sufficient interruption of the service to entitle the plaintiff to maintain the action, and that the rule to enter a nonsuit should be discharged.

WILLES and MONTAGUE SMITH, JJ., delivered judgement to the same effect.

1872. HEDGES *v.* TAGG, L. R. 7 Ex. 283.

In an action for seduction service must be proved to have subsisted between the person seduced and the plaintiff both at the date of the seduction and at the date of the resulting illness.

1872.

HEDGES v. TAGG.

Declaration for seduction of the plaintiff's daughter, then being the servant of the plaintiff, whereby, &c.

Pleas: (1) Not guilty; and (2) a denial that the daughter was the servant of the plaintiff. Issue.

At the trial before Kelly, C. B., at the Guildhall sittings after Easter Term last, it was proved that the seduction took place on August 18, 1870. The daughter was at that time in place as a governess, but was on a three days' visit to her mother, the plaintiff, with her employer's permission. One of the terms of her contract was, that she should be at liberty to return home for her holidays at certain times of the year; but the visit in question was not during the holiday time, but was an exceptional leave of absence granted for a particular purpose, to enable her to go to see some races at Oxford. Whilst she was at home for these three

days she assisted in domestic duties. When her confinement took place, she was in the service of another employer, by whom she was dismissed. She then returned home to her mother.

A verdict was returned for the plaintiff for £175, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that there was no evidence of service; and a rule was obtained accordingly.

Huddleston, Q. C., and Philbrick, showed cause. The action of seduction is founded upon a loss of service; but, according to the authorities, the performance of almost any duties, however light, is evidence of service. Here the daughter was under the plaintiff's roof when seduced, and though only on a visit, made herself useful in the house. Moreover, where the relation of parent and child exists, the law does not require proof of actual service. In *Terry* v. *Hutchinson* [1] constructive service was held sufficient. There the daughter, when seduced, was on her way home from an employer who had dismissed her. Yet the action was held maintainable. This case is different in one respect, because here the service with the employer was not terminated, as it was there. But there is nothing inconsistent in the two services existing together. With regard to the confinement taking place away from home, that is immaterial. It is enough if the relation of master and servant existed at the time of the seduction. *Thompson* v. *Ross* [2] is distinguishable. There the daughter was merely at home accidentally. Here the visit was by her mistress's permission, and during the visit her contract of service with her mistress had, in fact, been suspended, so as to make a new contract possible. In *Manley* v. *Field* [3] the person seduced was the real head of the house, her father being her guest, and on that ground the action failed. [They also cited *Rist* v. *Faux* [4]; *Davies* v. *Williams* [5].]

Parry, Serjt., and J. O. Griffits, were not called on to support the rule.

KELLY, C. B.—I regret to have to come to the conclusion that this rule must be made absolute. It has been truly said the action

[1] L. R. 3 Q. B. 599.
[2] 5 H. & N. 16; 29 L. J. (Ex.) 1.
[3] 7 C. B. (N. S.) 96; 29 L. J. (C. P.) 79.
[4] 4 B. & S. 409; 32 L. J. (Q. B.) 383.
[5] 10 Q. B. 725; 14 L. J. (Q. B.) 369.

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of seduction is founded on a fiction; but for that fiction there must be some foundation, however slender, in fact. In order to entitle a plaintiff to maintain the action, there must be in some shape or other the relation of master and servant existing between the plaintiff and the person seduced at the time when the seduction takes place. Now, in the cases cited the person seduced had been in the service of persons other than the plaintiff; but at the time of the seduction that relation had ceased. For example, in the case of *Terry* v. *Hutchinson*[1], the daughter of the plaintiff had quitted the service in which she had been; and it was held that the one service having ended, a fresh service with her father immediately began. But here, beyond all doubt, a relation of service existed, when the seduction took place, between the plaintiff's daughter and the lady in whose employment she was engaged. It is true that part of the contract was, that she was to go home for the holidays. But the seduction did not take place during the holidays. If it had, the case might have been different, and we might possibly have been justified in holding that the relation of service was temporarily constituted between the plaintiff and her daughter. Upon this point, however, I give no opinion. For it is quite unnecessary to decide it, as the plaintiff's daughter was only at home by her mistress's permission for a three days' visit, to attend the Oxford races.

Then it is contended that the two services may co-exist. So they may, but not unless by the contract the person employed is to be at the same time under the orders of two different people; and here there is no ground for such a contention.

Moreover, the consequences of the wrongful act did not manifest themselves while the plaintiff's daughter was at home. She was, at the time of her confinement, in a place again; so that, on this ground also, the action fails. There was no loss of service to her mother by reason of her inability to work. A nonsuit must, therefore, be entered.

MARTIN, CHANNELL, and BRAMWELL, BB., concurred.

Rule absolute.

[1] 1 L. R. 3 Q. B. 599.

1873. OSBORN *v.* GILLETT, L. R. 8 Ex. 88.

A master cannot bring an action for injuries to his servant *per quod servitium amisit*, where those injuries cause death (per Pigott, B., and Kelly, C. B.; dissentiente Bramwell, B. *et quaere*).

1873.

OSBORN v. GILLETT.

Declaration, stating that at the time, &c., and thence until the time of her death, one Elizabeth Osborn was the daughter and servant of the plaintiff; that the defendant by John Broadwater his servant negligently drove a wagon and horses against the said Elizabeth Osborn, whereby she was wounded and injured, and by reason thereof afterwards died; whereby the plaintiff lost the service of the said Elizabeth Osborn, and the benefits and advantages which would otherwise have accrued to him from such service, and was put to expense in conveying to his house the body of the said Elizabeth Osborn, and was afterwards and necessarily put to and incurred expense in preparing for, and in and about and incidental to, the burial of the same.

Pleas, (3), that the said Elizabeth Osborn was killed upon the spot by the acts and matters mentioned in the declaration, so that the plaintiff did and could not sustain any damage which entitles him to sue in this action for the acts complained of.

(4) That the acts and matters complained of in the declaration amounted in law to a felonious act by the said John Broadwater committed; and Broadwater at the commencement of this suit had not, and has not since, been tried, convicted, or acquitted of, nor in any manner prosecuted for, the said offence, although nothing ever existed to render such prosecution unnecessary, improper, inexpedient, or to entitle the plaintiff to sue in this action without the same having taken place.

Demurrer and joinder.

PIGOTT, B.—There are demurrers to the third and fourth pleas in this case. The action is brought for negligent driving by the defendant's servant, whereby Elizabeth, the daughter and servant of the plaintiff, was injured and killed, and in consequence the plaintiff lost her services, and was put to the expense of burying her.

By the third plea the defendant says that she was killed on the

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spot, and the first question is, whether this plea affords a good defence in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still I am of opinion that the law has been so understood up to the present time; and if it is to be changed it rests with the legislature and not with the courts to make the change.

It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in *Baker* v. *Bolton*[1]. That was, no doubt, a *nisi prius* decision; but it does not appear to have ever been questioned. The ruling was, that the death of any human being could not be complained of as an injury—i.e., as an actionable injury; and the law as then laid down has found its way into the various textbooks treating upon master and servant: 2 *Chitty on Pleading*, seventh edition, p. 488, *n*. There was nothing in that case to show that the negligence amounted to a felony, and, if death is caused without criminal negligence or by merely injudicious driving, it would not.

But, in addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act, 9 & 10 Vict. c. 93. The language is not confined to cases to which the maxim *actio personalis moritur cum personâ*, applies, but is perfectly general:—

'Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him.'

The remedy is then given to the deceased's personal representatives for the benefit of wife, husband, parent, and child only. Yet it must be manifest that numerous other cases in which special

[1] 1 Camp. 493.

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damages of various kinds are sustained (master and servant being one) must have been present to the mind of the framers of the statute, and, if such had been the intention, an express remedy would have been afforded in cases where proximate special damage resulted from the death so caused.

Several American authorities were also cited which show that the law in America has followed the ruling of Lord Ellenborough (*Eden* v. *Lexington and Frankfort Ry. Co*[1]; *Carey and Wife* v. *Berkshire Ry. Co.*[2]), but I do not think it necessary to rely upon these. The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago and expressly recognized by the legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act. For these reasons as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial.

I think the fourth plea is bad, for the reasons given on the argument—viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal and before prosecution.

BRAMWELL, B.[3]—The fourth plea in this case is clearly bad, *White* v. *Spettigue*[4] is in point. Indeed, this case is stronger. There the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in any one else to prosecute for the supposed felony.

I think the third plea bad also. The declaration shows that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken it was not, for it is not alleged,

[1] 14 B. Monroe, 204.
[2] 1 Cush. (Mass.) 475.
[3] This judgement was read by Pigott, B.
[4] 13 M. & W. 603.

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and there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued, though the negligence is not criminal so as to render the killing manslaughter.

Now, these pleadings show a state of things such that if the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work, but not killed, the action would be maintainable (see *Hodsoll* v. *Stallybrass*[1]), and the only question is, whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the *cestui que vie*. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of the annuitant he could maintain no action for a wrongful crippling or disabling of the *cestui que vie*, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shown to exist between the plaintiff and the servant in respect of which, if the master sustains damage in consequence of a wrongful act which injures the servant, the law gives the master a right of action, and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be; no reason was or could be given, except the supposed impolicy; but it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of showing this is on the defendant, who asserts it. He has to make out an exception to a general rule, and as no reason can be given for it, it seems to me to require very clear authority.

Mr. Prentice, for the defendant, relied, first, on the general rule or maxim, *actio personalis moritur cum personâ*. But that clearly means dies with the person who was to be party to the action as plaintiff or defendant. Dies with the person. What person? It is not any person or every person. If the servant here had lived six months, and during that period service had been lost,

[1] 11 A. & E. 301.

this action would clearly be maintainable, though she then died. Further, the maxim is *actio moritur*, which supposes it was once alive, but here the argument is that the plaintiff never had any action. In effect the plaintiff's case is, 'You killed my servant and caused me loss'; and the defendant's case is the same, 'I did kill her, and therefore never was liable.' The sense in which I say the maxim is to be understood is that put on it by Mr. Broom and the many authorities he cites in his *Maxims* (fifth edition, p. 904).

Next, Mr. Prentice relied on the recital of 9 & 10 Vict. c. 93, that 'no action is now maintainable against a person who by his wrongful acts may have caused the death of another person.' And certainly the words are large enough to include this case. But in justice to whomsoever is responsible for it, we ought to see what was the subject-matter being dealt with. When that is done it will appear manifest that such a case as this was not in contemplation. For (it is somewhat strange) the section proceeds to say that wherever the death of a person shall be caused by a wrongful act, and the act 'is such as would (if death had not ensued) have entitled the party injured to maintain an action,' there the person who would have been liable if death had not ensued shall be liable, 'notwithstanding the death of the party injured,' that means killed; so that the death is to make a man liable to an action notwithstanding the death. But that the words 'party injured' in the phrase 'would have entitled the party injured' must mean the same as where they again occur, and, therefore, mean 'party killed,' the present case would be comprehended in this enactment; for the plaintiff is a 'party injured.' But it is manifest by s. 2 that the cases the statute is dealing with are cases where no action lay by the representatives of a deceased person to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all respect to the legislature and the author of this section, I require stronger authority for the anomaly the defendant contends for, than a loose recital in an incorrectly drawn section of a statute, on which the Courts had to put a meaning from what it did not rather than did say: *Franklin* v. *South-Eastern Ry. Co.*[1]

The next authority relied on was *Baker* v. *Bolton*[2]. Now,

[1] 3 H. & N. 211, at p. 214.

[2] 1 Camp. 493.

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certainly, as reported, it favours the defendant's view, for Lord Ellenborough is reported to have said that 'in a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence.' The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts and the loss of his wife's society and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recovery for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a *nisi prius* case, the plaintiff got £100, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument. The reporter puts a most significant query [1],—Why should the answer to it be 'Yes,' as the defendant contends?

The next authority cited by the defendant is *Higgins* v. *Butcher* [2]. According to that report the plaintiff showed no damage to himself. He said his wife was beaten and died, to his damage. This shows no pecuniary damage to him. Then Tanfield, J., expresses an opinion which was overruled in *White* v. *Spettigue* [3], and which, as it does not give as the reason that death gives no cause for action, may be said by its silence on that to be in defendant's favour. The same case is reported by Noy [4] who states the declaration, and in that report also no damage to the plaintiff is shown. Then the Court say the king is to punish a felony, and Tanfield, J., is stated to have said that the action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise if a servant. This is rather an authority for the plaintiff than the defendant. This case is men-

[1] *Quaere.*—If the wife be killed on the spot, is this to be considered *damnum absque iniuriâ*? (1 Camp. at p. 494).

[2] Yelv. 89. [3] 13 M. & W. 603. [4] Noy, 18.

tioned by Twisden in *Cooper* v. *Witham* [1], as depending on the act being a felony.

The remaining authorities are American, not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 Cush. 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported, *Skinner* v. *Housatonic Ry. Corp.*, an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case, *Carey and Wife* v. *Berkshire Ry. Co.*, an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the Court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgement is, 'If these actions, or either of them, can be maintained, it must be on some established principle of the common law.' Now, that is true, and the principle is *iniuria* and *damnum*, for which the defendant is responsible. The judgement proceeds, 'and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel and we cannot find any. This is very strong evidence that such actions cannot be supported.' With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favour, that *iniuria* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule when the *iniuria* causes death. If the case had been viewed in this way, the reasons of the Court tell for the plaintiff. For in

[1] 1 Lev. 247.

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my judgement the exception is not upon any established principle of the common law; it is not applied in any adjudged case in the English books; it is not stated in any elementary treatise. They then cited and relied on *Baker* v. *Bolton* [1], on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the Court, but suppose it may have passed *sub silentio*. I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

The other case, *Eden* v. *Lexington and Frankfort Ry. Co.* [2] is in the Kentucky Court of Appeal. This was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, &c. But in the judgement the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this:—'But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office.' This was said to be the established common law doctrine in the case of *Baker* v. *Bolton* [1]. It is true Lord Ellenborough is reported to have said that in a civil court death could not be complained of as an injury. But there is nothing else to justify the above opinion, and if this is the authority, *White* v. *Spettigue* [3] shows its inapplicability here. The judgement proceeds:—'The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential.' I have dealt with this argument before. It is this:—'Wrongful death which causes a damage gives no action because it is death which causes it.' The judgement proceeds to say 'that damages

[1] 1 Camp. 493. [2] 14 B. Monroe, 204.
[3] 13 M. & W. 603.

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may be recovered up to the time of death, but not beyond.' The reason of this seems to be that all injuries affecting life caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

I do not like criticizing a variety of authorities, and escaping from their general effect by a variety of small differences and objections. But in this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear—viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should show a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of *Baker* v. *Bolton*[1] there is no semblance of an authority on this side of the Atlantic, and the cases from the other side are merely founded on that one, and some vague notion of merger in a felony. I may observe that Mr. Smith, in his excellent work on *Master and Servant* (third edition, p. 139), assumes as certain that this action would lie.

On the main question, then, I think the plaintiff entitled to judgement; but it seems to me clear that he is entitled to the burial expenses. He says in his declaration that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. Now, *Reg.* v. *Vann*[2] shows he was bound to bury the child if he had the means, which he may have had. On this the judgement in the case of *Eden* v. *Lexington and Frankfort Ry. Co.*[3] is express; so also in *Baker* v. *Bolton*[1] the plaintiff recovered for loss up to the wife's death. In my opinion the plaintiff is entitled to judgement.

[1] 1 Camp. 493. [2] 2 Den. Cr. C. 325; 21 L. J. (M. C.) 39.
[3] 14 B. Monroe, 204.

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KELLY, C. B., delivered a judgement agreeing with that of PIGOTT, B.

Judgement for the defendant.

1853. LUMLEY *v.* GYE, 22 L. J. Q. B. 463; S. C. 2 E. & B. 216.

It is actionable (*a*) for one who has notice of the relation subsisting between them to entice away a servant from his master or a wife from her husband; (*b*) to maliciously procure the breach of a contract of personal service of any kind.

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This was a demurrer to a declaration which stated in effect that the plaintiff had contracted with one Johanna Wagner to perform divers operas in his theatre from April 15, 1852, until July 13 of the same year, upon the terms (*inter alia*) not to sing or use her talents elsewhere than in the plaintiff's theatre during the said period without the written authority of the plaintiff; yet the defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure the plaintiff, whilst the said agreement was in full force, wrongfully and maliciously enticed and procured the said Johanna Wagner to refuse to perform in the said theatre and to abandon her contract with the plaintiff and against his will.

There being a difference of opinion, the learned judges now delivered their judgements *seriatim*.

CROMPTON, J.—[His lordship having read the declaration, proceeded]—The question for our decision is, whether all or any of the counts are good in substance. The effect of the first two counts is, that a person under a binding contract to perform at a theatre is induced, by the malicious act of the defendant, to refuse to perform and entirely to abandon her contract, whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating that the performer had agreed to perform as the dramatic *artiste* of the plaintiff, and *had become and was* the dramatic *artiste* of the plaintiff for reward to her, and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic *artiste*, whereby she did depart out of the employment and service of the plaintiff, whereby

damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the first two counts, to have entered upon the service of the plaintiff, and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury: and the law as to enticing servants was said to be contrary to the general rules and principles of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of the Statute of Labourers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties, and that in all other cases of contract the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act, for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue. And I think that the

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relation of master and servant subsists sufficiently for the purpose of such action during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same whether the wrongdoer entices away the gardener who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists. The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master. In *Blake* v. *Lanyon*[1] it was held, by the Court of King's Bench, in accordance with the opinion of Gawdy, J., in *Adams* v. *Bafealds*[2], and against the opinion of the two other judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away, and although the defendant had received the servant innocently. It is there said that 'a person who contracts with another to do certain work for him is the servant of that other till the work is finished; and no other person can employ such servant to the prejudice of the first master. The very act of giving him employment is the means of keeping him out of his former service.' This appears to me to show that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake* v. *Lanyon*[1] the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant, in which he actually was, but inasmuch as there was a binding contract of service with the plaintiff, and the defendant kept the party after notice, he was held liable to an action. Since this decision, actions for wrongfully hiring or harbouring servants after the first actual service had been put an end to have been

[1] 6 T. R. 221. [2] 1 Leo. 240.

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frequent. See *Pilkington* v. *Scott* [1], *Hartley* v. *Cummings* [2]. In *Sykes* v. *Dixon* [3], where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred either to the Bar or to the Court that the action would fail on account of there having been no actual service at the time of the second hiring or harbouring; but the question as to there being or not being a binding contract of service in existence at the time seems to have been regarded as the real question. The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the *artiste* of the plaintiff, and that the defendant had induced her to depart from the employment.

But it was further said that the engagement, employment, or service in the present case was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act, more especially when the party is bound to give such personal services exclusively to the master or employer, though I by no means say that the service need be exclusive.

Two *Nisi Prius* decisions were cited by the counsel for the defendant in support of this part of the argument. One of these cases, *Ashley* v. *Harrison* [4], was an action against the defendant for having published a libel against a performer, whereby she was deterred from appearing on the stage, and Lord Kenyon held the action not maintainable. This decision appears, especially from the report of the case in 1 Esp. 48, to have proceeded on the

[1] 15 M. & W. 657; s. c. 15 L. J. (Ex.) 329.
[2] 5 Com. B. Rep. 247; s. c. 17 L. J. (C. P.) 84.
[3] 9 Ad. & E. 693; s. c. 8 L. J. (Q. B.) 102.
[4] Peake, N. P. 256.

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ground that the damage was too remote to be connected with the defendant's act. This was pointed out as the real reason of the decision by Mr. Erskine in the case of *Tarleton* v. *M'Gawley* [1], tried at the same sittings as *Ashley* v. *Harrison* [2]. The other case, *Taylor* v. *Neri* [3], was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services; and Eyre, C. J., said that he did not think that the Court had ever gone farther than the case of a menial servant, for that if a daughter had left the service of her father, no action *per quod servitium amisit* would lie. He afterwards observed, that if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business, could maintain an action; and he said that the record stated that Breda was a servant hired to sing, and in his judgement he was not a servant at all; and he nonsuited the plaintiff. Whatever may be the law as to the class of actions referred to for assaulting or debauching daughters or servants, *per quod servitium amisit*, and which differ from actions of the present nature for a wrongful enticing or harbouring with notice, as pointed out by Lord Kenyon in *Fores* v. *Wilson* [4], it is clear from *Blake* v. *Lanyon* [5] and other subsequent cases, *Sykes* v. *Dixon* [6], *Pilkington* v. *Scott* [7], and *Hartley* v. *Cummings* [8], that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor* v. *Neri* [3]. In *Blake* v. *Lanyon* [5] a journeyman who was to work by the piece, and who had left his work unfinished, was held to be a servant for the purposes of such an action; and I think that it was most properly laid down by the Court in that case, that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule; and I think that where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule; and I see no reason for narrowing such

[1] Peake, N. P. 270. [2] Peake, N. P. 256. [3] 1 Esp. 386.
[4] Peake, N. P. 77. [5] 6 T. R. 221.
[6] 9 Ad. & E. 693; s. c. 8 L. J. (Q. B.) 102.
[7] 15 M. & W. 657; s. c. 15 L. J. (Ex.) 329.
[8] 5 Com. B. 247; s. c. 17 L. J. (C. P.) 84.

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a rule; but I should rather, if necessary, apply such a remedy to a case 'new in its instance, but not new in reason and principle'[1], that is, to a case where the wrong and damage are strictly analogous to the wrong and damage in a well-recognized class of cases.

In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. Cowling is not tenable, or as saying that in no case except that of master and servant is an action maintainable for *maliciously* inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer to say that the act in such cases is the act of the party who breaks the contract, for that reason would apply in the acknowledged case of master and servant; nor is it an answer to say that there is a remedy against the contractor, and that the party relies on the contract, for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrongdoer may be for a different matter, and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, *with a malicious intent to ruin a rival trader*, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party, I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment or a writ of conspiracy at common law might perhaps be maintained; and where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action. In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act is one which causes the servant or contractor not to perform the work or contract which he would

[1] See *Keeble* v. *Hickeringill*, 11 East, 574.

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otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant; and it would seem unjust and contrary to the general principles of law if such wrongdoer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. Cowling on this part of the case seem well worthy of attention. Without, however, deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously procures* a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such service *during the period for which she had so contracted*, whereby the plaintiff was injured. I think, therefore, that our judgement should be for the plaintiff.

ERLE, J.—The question raised upon this demurrer is, whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time, whereby damage was sustained; and it seems to me that it will. The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided; and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such a performance, the answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is

immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong; as in violations of a right to property, whether real or personal, or to personal security, he who procures the wrong is a joint wrongdoer and may be sued either alone or jointly with the agent in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party, and if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract, the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the actions for this wrong in respect of other contracts than those of hiring are not numerous; but still they seem to me sufficient to show that the principle has been recognized. In *Winsmore* v. *Greenbank*[1], it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued; but the judgement rests on no such grounds. The procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green* v. *Button*[2] it was decided, that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Shepherd* v. *Wakeman*[3] is to the same effect, where the defendant procured a breach of a contract of marriage, by asserting that the woman was already married. In *Ashley* v. *Harrison*[4] and in *Taylor* v. *Neri*[5] it was properly decided that the action did not lie, because the battery in the first case and the libel in the second case upon the contracting parties were not shown to be with intent to cause those persons to break their contract, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring these breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least, Lord Mansfield's judgement in

[1] Willes, 577. [2] 2 Cr. M. & R. 707; s. c. 5 L. J. (Ex.) 81.
[3] 1 Sid. 79. [4] Peake, N. P. 256. [5] 1 Esp. 386.

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LUMLEY v. GYE.

Erle, J.

Bird v. *Randall*[1] is to that effect. This principle is supported by good reason: he who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract, may inflict an injury, the same as he who procures the abstraction of goods after delivery, and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted; or in the case of non-payment of a debt, where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or in the case of the non-delivery of goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach of the agreement. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection, that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and, in my judgement, ought to be equally actionable. The relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto. The result is, that there ought to be, in my opinion, judgement for the plaintiff.

WIGHTMAN, J., delivered judgement to the like effect. COLERIDGE, J., dissented from the proposition stated in clause (*b*) in the headnote.

Judgement for the plaintiff.

NOTE.—As to the meaning of the word 'maliciously' in the headnote to this case, and as to the possible qualifications on the general liability which it involves, see per Collins, M. R., in *Read* v. *Friendly Society of Operative Stonemasons*, 1902, 2 K. B. at pp. 738-740, and the dissenting judgement of Vaughan-Williams, L. J., in *Glamorgan Coal Co. Limited* v. *South Wales Miners' Federation*, 1903, 2 K. B. at p. 569.—[ED.]

[1] 3 Burr. 1345.

1898. ALLEN *v.* FLOOD, L. R. 1898, App. Cas. 1.

It is not actionable for a person to procure an employer to discharge or not to employ a workman when there is no question of conspiracy, intimidation, coercion or other illegal act on the part of the person so procuring, or of a breach of contract on the part of the employer; even although such procurement be malicious.

An act which does not amount to a legal injury cannot become actionable merely because it is done with a bad intent.

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The facts material to this appeal (omitting matters not now in question) were as follows: In April 1894 about forty boiler-makers, or 'iron-men,' were employed by the Glengall Iron Company in repairing a ship at the company's Regent Dock in Millwall. They were members of the boiler-makers' society, a trade union, which objected to the employment of shipwrights on ironwork. On April 12 the respondents Flood and Taylor, who were shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing ironwork. The boiler-makers, on discovering that the respondents had shortly before been employed by another firm (Mills & Knight) on the Thames in doing ironwork on a ship, became much excited and began to talk of leaving their employment. One of them, Elliott, telegraphed for the appellant Allen, the London delegate of the boiler-makers' society. Allen came up on the 13th, and being told by Elliott that the iron-men, or some of them, would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the council of the society that they should be deprived of all benefit from the society and be fined, and that they must wait and see how things settled. Allen then had an interview with Halkett, the Glengall Company's manager, and Edmonds the foreman, and the result was that the respondents were discharged at the end of the day by Halkett. An action was then brought by the respondents against Allen for maliciously and wrongfully and with intent to injure the plaintiffs procuring and inducing the Glengall Company to break their contract with the plaintiffs and not to enter into new contracts with them, and also maliciously, &c., intimidating and coercing the plaintiffs to break, &c., and also unlawfully and maliciously conspiring with others to do the above acts.

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At the trial before Kennedy, J., and a common jury Halkett and Edmonds were called for the plaintiffs, and gave their account of the interview with Allen. In substance it was this: Allen told them that he had been sent for because Flood and Taylor were known to have done ironwork in Mills & Knight's yard, and that unless Flood and Taylor were discharged all the members of the boiler-makers' society would be 'called out' or 'knock off' work that day: they could not be sure which expression was used; that Halkett had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork, and wherever these men were employed, or other shipwrights who had done ironwork, the boiler-makers would cease work—in every yard on the Thames. Halkett said that if the boiler-makers (about 100 in all were employed) had been called out it would have stopped the company's business, and that in fear of the threat being carried out he told Edmonds to discharge Flood and Taylor that day, and that if he knew of any shipwrights having worked on ironwork elsewhere, when he was engaging men, for the sake of peace and quietness for themselves he was not to employ them. Allen was called for the defence.

Kennedy, J., ruled that there was no evidence of conspiracy, or of intimidation or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time. In the ordinary course their employment would have continued till the repairs were finished or the work slackened.

In reply to questions put by Kennedy, J., the jury found that Allen maliciously induced the Glengall Company (1) to discharge Flood and Taylor from their employment; (2) not to engage them; that each plaintiff had suffered £20 damages; and that the settlement of the dispute was a matter within Allen's discretion. After consideration Kennedy, J., entered judgement for the plaintiffs for £40. This decision was affirmed by the Court of Appeal (Lord Esher, M. R., Lopes and Rigby, L. JJ.)[1]. Against these decisions Allen brought the present appeal. It was argued first before Lord Halsbury, L. C., and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey on December 10, 12, 16, 17, 1895, and again (the following judges having been summoned

[1] [1895] 2 Q. B. 21.

to attend—Hawkins, Mathew, Cave, North, Wills, Grantham, Lawrance, and Wright, JJ.) on March 25, 26, 29, 30, April 1, 2, 1897, before the same noble and learned lords, with the addition of Lords Ashbourne, and James of Hereford.

At the close of the arguments the following question was propounded to the judges: Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?

The judges desired time to consider, and on June 3, 1897, delivered their opinion, whereby it appeared that Hawkins, Cave, North, Wills, Grantham, and Lawrance, JJ., thought that the question should be answered in the affirmative, and Mathew and Wright, JJ., in the negative.

LORD WATSON.—My Lords, this appeal, in which the litigants are members of two rival associations of working men, registered under the Trade Unions Act of 1871, raises some important questions, upon which there appears to be room for considerable difference of opinion. The appellant is a member, and the London delegate, of the boiler-makers' society, an association which restricts the labour of its members to ironwork; whilst the two respondents belong to the society of shipwrights, whose members are permitted to work either in wood or iron—an alternative which, whether rightly or wrongly, is not regarded with favour by the boiler-makers.

In the month of April, 1894, about forty men of the boiler-makers' society were engaged at the Regent Dock, Millwall, in repairing an iron ship, on the employment of the Glengall Iron Company. The respondents were at the same time employed by the company to execute repairs upon the woodwork of the vessel. The boiler-makers having learned that the respondents, although they were at that time engaged in carpenter-work, had on previous occasions undertaken and executed ironwork in other shipyards, resolved that they would not continue at the same job with workmen who wrought in iron as well as wood; and they were accordingly prepared to leave the Regent Dock in a body as soon as their engagement with the Glengall Iron Company, which was merely from day to day, expired. Being apprehensive, however,

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that they might not be allowed strike pay by their union if they left their work without the approval of some of its office-bearers, they on April 12 telegraphed for the appellant, who, in compliance with their request, went to the yard on the morning of the day following. He was there met by one of the workmen who had sent for him, who on their behalf informed him that they objected to the respondents, who had done ironwork elsewhere, working among them, and that they intended in consequence to leave the work on that day after the dinner-hour. The appellant intimated that in his opinion the men would not be justified in striking work as they contemplated until an attempt had been made to settle the matter otherwise. He then had an interview with the managing director of the Glengall Iron Company, at which the foreman of the yard was present, the result being that on the afternoon of the same day the services of the respondents were dispensed with by the company, and the boiler-men continued at their work.

The present action was brought against the appellant in the beginning of July 1894, and in February 1895 it was tried before Kennedy, J., and a jury, who returned affirmative answers to these two questions: '(1) Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs, or either of them, from their employment? (2) Did the defendant Allen maliciously induce the Glengall Iron Company not to engage the plaintiffs, or either of them?' and assessed damages to each of the respondents at £20.

The appellant contends that judgement ought to be entered in his favour, inasmuch as the findings of the jury, when rightly interpreted, do not disclose any cause of action against him; and, alternatively, that these findings being against the weight of evidence, the case ought to be sent back for new trial. I have not found it necessary to consider the second of these propositions, having arrived at the conclusion that the first of them is well founded.

The substance of the verdict may be resolved into these three findings: first, that the Glengall Iron Company discharged the respondents from their employment and did not re-engage them; secondly, that the company were induced to do so by the appellant; and, thirdly, that the appellant maliciously induced the action of the company. There is no expression in the verdict which can be

held, either directly or by implication, to impeach the legality of the company's conduct in discharging the respondents. The mere fact of an employer discharging or refusing to engage a workman does not imply or even suggest the absence of his legal right to do either as he may choose. It is true that the company is not a party to this suit; but it is also obvious that the character of the act induced, whether legal or illegal, may have a bearing upon the liability in law of the person who procured it. The whole pith of the verdict, in so far as it directly concerns the appellant, is contained in the word 'maliciously'—a word which is susceptible of many different meanings. The expression 'maliciously induce,' as it occurs upon the face of the verdict, is ambiguous: it is capable of signifying that the appellant knowingly induced an act which of itself constituted a civil wrong, or it may simply mean that the appellant procured, with intent to injure the respondents, an act which, apart from motive, would not have amounted to a civil wrong; and it is, in my opinion, material to ascertain in which of these senses it was used by the jury.

Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considera-

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tions consists in this—that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tends to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it; and still less that an act in itself lawful is converted into a legal wrong if it was done from a bad motive.

Lord Bowen (at that time Bowen, L. J.), in the case of the *Mogul Steamship Co.* v. *McGregor*, laid it down that in order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. The learned judge, with his accustomed accuracy and felicity, said[1]: 'We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term "wrongful" imports in its term the infringement of some right.'

The words which I have quoted are in substantial agreement with the language used by Bayley, J., in *Bromage* v. *Prosser*[2], to the effect that 'malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.' According to the

[1] L. R. 23 Q. B. D. 612. [2] 4 B. & C. 255.

learned judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer in responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that Bayley, J., obviously refers.

The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive.

It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive, namely, an intention to injure the respondents in their trade or calling of shipwrights. At the trial, the case for the plaintiff was conducted, and was submitted to the jury by the learned judge who presided, upon the lines laid down by the Master of the Rolls and Lopes, L. J., in *Temperton* v. *Russell*[1]. When the present case was before the Appeal Court, the same doctrine was repeated by the Master of the Rolls and Lopes, L. J., and was expounded at great length by Lord Esher. Rigby, L. J., deferred to, but did not express his concurrence in, the authority of *Temperton* v. *Russell*[1], which he accepted as binding upon him. The doctrine is thus stated by the Master of the Rolls[2]: 'Now it is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all. But, if it is done maliciously, for the purpose of injuring the person to whom the advice is given, or for the purpose of injuring some one else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind, the result is the same whether the persuasion is to break a contract or not to make a contract.

[1] [1893] 1 Q. B. 715. [2] [1895] 2 Q. B. 37.

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One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But, if the person uses that persuasion with intent to injure the other, or to injure the other with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful.' In that state of the law, as expounded in the Appeal Court, it is not surprising to find that Kennedy, J., whilst he did not suggest to the jury that the action of the appellant, apart from its motive, constituted a legal wrong, directed them to consider whether the appellant acted 'maliciously,' and explained that by that word he meant 'with the intention and for the purpose of doing an injury to the plaintiffs in their business.'

I do not dispute that the law laid down in this case by the presiding judge, and upheld by the Court of Appeal, would justify the verdict of the jury. It simply comes to this: that to induce another person to commit an act which is within his legal right does not in itself afford a cause of action; but that the person who procures his action is guilty of a legal wrong, if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed. The words which I have already quoted clearly disclose the doctrine which runs through Lord Esher's judgement. Whether mere 'persuasion' or mere 'advice' entails liability on the person using it appears to me to be a speculation which it would be unprofitable to discuss, and I shall therefore assume that the words refer to the means used by a person who, in the sense of law, 'procures' the act of another. A breach of contract is in itself a legal wrong; and in *Lumley* v. *Gye*[1] it was said by Erle, J. (afterwards Erle, C. J.): 'It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong.' In the same case it was held by the majority of the learned judges that the defendant was liable in damages upon the express ground that, in knowingly procuring an illegal act, he had committed a wrong which the law regards as malicious. They regarded malice as signifying in law, not that the defendant had been actuated by a bad motive, but that he had procured the commission of an act which he knew to be illegal.

[1] 2 E. & B. 216, 232; and *supra*, p. 98.

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There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*[1], the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.

The question submitted by the House for the opinion of the learned judges who have favoured us with their assistance was: 'Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?' The terms in which the query is framed afford an opportunity, of which some of the learned judges have not been slow to avail themselves, of referring to the evidence of the respondents' witnesses in quest of some fact which might impart a legal and not a conventional meaning to malice as found by the jury. But, according to my apprehension, it was not intended, nor would it be legitimate, in pursuing that investigation to disregard the pleadings of the respondents, or the course which was followed by their counsel, at the trial of the cause. To deal with the case on any other terms would be to start issues which the respondents themselves never raised until they came to the bar of this House, and to apply to these issues evidence which was directed, not to these, but to other points. I therefore find it necessary to express an opinion upon various questions which were canvassed in the course of the argument addressed to us.

First of all, although the statement of claim set forth that the appellant induced the Glengall Iron Company to 'break and refuse to perform their contract' with the respondents, the allegation is not borne out by their own evidence. One of them (Taylor) only goes the length of saying that 'When a man is once put on he is entitled to come back, day by day, until the job is finished or he is discharged'; and the other (Flood) stated substantially the same thing, with the addition that there was no rule as to the time of

[1] 2 E. & B. 216.

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notice. Then, at the trial, the cross-examination for the appellant in regard to the matter of contract was stopped by the presiding judge with the observation, 'So far as the breach of contract was opened, in fact there was no breach of contract, because the employment was day by day, and terminated at the end of each day.' And in charging the jury the learned judge, referring to the averment of breach in the statement of claim, again observed, without objection or exception taken by the respondents' counsel, 'that has altogether fallen through, because it is quite clear that there was no contract existing which the defendants or any of them could have induced the Glengall Iron Company to break with the plaintiff.'

Assuming that the Glengall Iron Company, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley* v. *Gye*[1], already referred to, a person who by illegal means, that is means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word 'means' is understood in its natural and proper sense that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.

It has been maintained, and some of the learned judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Company to terminate their connexion with the respondents; but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Company, who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and

[1] 2 E. & B. 216.

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operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell*[1] and the present case it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive.

It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between different associations of working men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views. That the boiler-makers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding. Not only so; they were, in my opinion, entitled to inform the Glengall Iron Company of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative. If the workmen had made the communication themselves, and had been influenced by bad motives towards the respondents, then, according to the law which has been generally accepted by the Courts below, they would each and all of them have incurred responsibility to the respondents. But it was clearly for the benefit of the employers that they should know what would be

[1] [1893] 1 Q. B. 715.

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the result of their retaining in their service men to whom the majority of their workmen objected; and the giving of such information did not, in my opinion, amount to coercion of the employers, who were in no proper sense coerced, but merely followed the course which they thought would be most conducive to their own interests.

I think it is right to observe that if the evidence had, in my opinion, contained statements sufficient to support a charge of coercion, I should have declined in the circumstances of the present case to give effect to it. It is quite true that in the fifth count of the statement of claim intimidation and coercion are alleged; but it is equally true that from the time when that pleading was filed until the second argument upon this appeal the word 'coercion' or its equivalents have never been heard except in one instance. It does not even occur in the respondents' case; and the exception to which I have referred is to be found in the charge of the learned judge who, without any challenge by the respondents' counsel, made the observation to the jury: 'There is no evidence here, of course, of anything amounting to intimidation or coercion in any legal sense of the term.' The evidence now relied on as showing intimidation and coercion was adduced to prove, and was represented to the jury as proving, the *malus animus* of the appellant, and nothing else. I entertain little doubt as to the incompetency, but none as to the inexpediency of this House entertaining and deciding an issue of fact which, if not formally abandoned, was not brought forward at the trial or submitted to the jury, and that upon evidence which was not directed to it, for the purpose of patching up a verdict which is impeached in point of law.

The doctrine laid down by the Court of Appeal in this case, and in *Temperton* v. *Russell*[1], with regard to the efficacy of evil motives in making—to use the words of Lord Esher—'that unlawful which would otherwise be lawful,' is stated in wide and comprehensive terms; but the majority of the consulted judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application it would lead in some cases to singular results. One who committed an act not in itself illegal, but attended with

[1] [1893] 1 Q.B. 715.

consequences detrimental to several other persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man, and desired to punish him, would be liable in an action for tort. And *ex pari ratione*, a servant would be liable in damages to a master whom he disliked if he left his situation at the expiry of his engagement and declined to be re-engaged, in the knowledge and with the intent that the master would be put to considerable inconvenience, expense, and loss before he could provide a substitute. If that be the state of the law, it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained. The authority which is mainly relied on as supporting the doctrine of the recent decisions is *Keeble* v. *Hickeringill*[1], which was decided by the Court of Queen's Bench about two centuries ago. I am very far from suggesting that the antiquity of a decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is clearly in point, and its principle has since been recognized and acted upon.

In *Keeble* v. *Hickeringill*[1] the plaintiff sued for the disturbance of a decoy upon his property, which he used for the purpose of capturing wild fowl and sending them to market. The defendant, who was an adjoining proprietor, had fired guns upon his own land, not with the view of killing game or wild fowl, but with the sole object of frightening the birds, and either driving them out of his neighbour's decoy pond or preventing them from entering it. The act complained of was, in substance, the making of a noise so close to the lands of the plaintiff as to be a nuisance to him. Upon that aspect of the case I do not find it necessary to express any opinion as to the conduct of the defendant; but this much is clear, that no proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and if he does so intentionally, he is guilty

[1] 11 East, 574, n.

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of a malicious wrong, in its strict legal sense. Holt, C. J., who delivered the opinion of his Court, treated the case as one of interference with the plaintiff's trade, consisting in the capture and sale of wild fowl. He distinguishes it from the case of invading a franchise, which, I apprehend, would in itself amount to a legal wrong, and thus states the law applicable to it: 'Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases.' I see no reason to doubt that by a 'violent act' the learned judge had in view an act of violence done in such circumstances as to make it amount to a legal wrong; and I see as little reason why, in speaking of a 'malicious act,' he should not be understood as using the word 'malicious' in its proper legal sense, and as referring to other wrongs, not accompanied by violence, but done intentionally, and, therefore, in the eye of the law, maliciously. The object of an act, that is, the results which will necessarily or naturally follow from the circumstances in which it is committed, may give it a wrongful character, but it ought not to be confounded with the motive of the actor. To discharge a loaded gun is, in many circumstances, a perfectly harmless proceeding; to fire it on the highway, in front of a restive horse, might be a very different matter.

The learned chief justice proceeds to give various illustrations of the general rule which he had formulated. He first notices a case in which it had been held that a schoolmaster had no cause of action against a defendant who had attracted his pupils and injured his school by setting up a rival establishment, a proceeding which was obviously in the ordinary course of competition, and then adds: 'But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.' From that observation I see no reason to differ, because, in my opinion, frightening a child with a gun so that it cannot get to school is in itself a violent and unlawful act, directed both against the child and its schoolmaster. The learned judge then refers to three instances in which the defendant would be liable in an action upon the case: (1) where he obstructs a person in charge of a horse, who is taking it to a market for sale, and prevents his reaching the market, thereby

depriving the market owner of his dues; (2) where, to the detriment of a proprietor, he by threats frightens away his tenants-at-will; and (3) when he beats a servant, and so hinders him from taking his master's tolls. It must be observed that, apart from any question of motive, all these cases involve the use of means in themselves illegal—obstruction, coercion by means of threats, and personal assault.

But assuming, what to my mind is by no means clear, that *Keeble* v. *Hickeringill*[1] was meant to decide that an evil motive will render unlawful an act which otherwise would be lawful, it is necessary to consider how far that anomalous principle has been recognized in subsequent decisions. Laying aside the recent decisions which are under review in this appeal, only one case has been cited to us in which the Court professed that they were guided by the reasoning of Holt, C. J. That instance is to be found in *Carrington* v. *Taylor*[2], a decision which I venture to think that no English court would at this day care to repeat. The facts of the case resembled those which occurred in *Keeble* v. *Hickeringill*[1] in this single respect, that the plaintiff was the owner of a decoy for wild fowl. The defendant was the owner of a boat in which he rowed along the coast and earned a livelihood by shooting wild fowl for the market, which he was lawfully entitled to do. But some of the shots fired by him in the pursuit of that occupation had the effect of scaring birds which otherwise would or might have entered the plaintiff's decoy; and, in respect of that disturbance, he was held liable in damages to the plaintiff. Whatever construction might be put upon the judgement of Holt, C. J., it does not appear to me to contain a single expression which would justify that result. I am not surprised to find that an eminent judge, with whose opinion as a whole I am unable to concur, has had the courage to express his dissent from the judgement in *Carrington* v. *Taylor*[2], as he failed 'to see what wrong the defendant in that case had done.' To my mind the case is of considerable importance, because it shows that in the year 1809 the Court of King's Bench did not regard *Keeble* v. *Hickeringill*[1] as establishing the doctrine that a lawful act, done with intent to injure, will afford a cause of action. In the case before them there was no allegation and no evidence of any intent to injure the plaintiff's

[1] 11 East, 574, n. [2] 11 East, 571.

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decoy. The sole motive of the defendant in firing his gun was to earn his livelihood by killing wild fowl for the market. I cannot avoid the conclusion that the learned judges accepted *Keeble* v. *Hickeringill*[1] as an authority to the effect that, apart from any question of motive, the disturbance of a lawful decoy is an illegal invasion of the private right of its proprietor.

A variety of well-known cases, including even *Lumley* v. *Gye*[2], were relied on by the respondents as showing that the so-called principle of *Keeble* v. *Hickeringill*[1] has been from time to time applied by the English Courts since the date of that judgement. Except in the case of *Carrington* v. *Taylor*[3], which I have already noticed, I have been unable to discover in these authorities, which I do not consider it necessary to examine in detail, any trace of the doctrine for which the respondents contend until recent years, when it is first firmly foreshadowed in a dictum which occurs in *Bowen* v. *Hall*[4], and is subsequently developed in *Temperton* v. *Russell*[5] and in the present case. The authorities antecedent to *Bowen* v. *Hall*[4], as well as that decision itself, are all cases belonging to one or other of these three classes: (1) cases of privilege, where the perpetrator of an act which *per se* constituted a legal wrong was protected from its usual consequences in the event of its being proved that he was actuated by an honest desire to fulfil a public or private duty; (2) cases in which the act complained of was in itself a plain violation of private right; and (3) cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means.

The early case of *Garret* v. *Taylor*[6] furnishes an apt illustration of the third class. According to the report, which is very brief, the plaintiff, a quarryman, complained that the defendant had, by threats to 'mayhem' and annoy them with litigation, induced or coerced some of his customers to discontinue buying stones from his quarry. Decree passed in absence, and the case was reheard on an appeal brought by the defendant in arrest of judgement upon the ground that the declaration did not disclose any cause of action. The declaration[7] discloses facts which, if true, as they were necessarily assumed to be, did amount to illegal means used

[1] 11 East, 574, n.
[2] 2 E. & B. 216.
[3] 11 East, 571.
[4] L. R. 6 Q. B. D. 333.
[5] [1893] 1 Q. B. 715.
[6] Cro. Jac. 567.
[7] 2 Roll. Rep. 162.

in order to influence the action of the plaintiff's customers. One learned judge has assumed that the judgement went on the principle that every man 'has a right to carry on his trade without disturbance,' a proposition which was not involved in the case, but which I should not demur to if he meant 'illegal' disturbance. The decision really went upon the terms of the declaration, which appears to me to disclose a clear case of the employment of unlawful means. I am not at present prepared to hold that threats of vexatious litigation, which might cause anxious apprehension in the minds of many, will in no circumstances amount to unlawful influence; but I entertain no doubt that these, when coupled with serious threats of personal violence going the length of mutilation or demembration, do, when the party threatened is overcome by and yields to them, constitute legal coercion.

Tarleton v. *M'Gawley*[1] is a case of the same complexion. Two British ships, the *Othello* and the *Bannister*, were lying near to each other off the Calabar coast, both engaged in the same kind of adventure, that of bartering their cargoes for palm-oil and other West African produce. A canoe manned by natives desiring to trade was approaching the *Bannister* for that purpose, when the master of the *Othello* directed against it and fired a cannon loaded with gunpowder and shot and killed one of its crew, an outrage which occasioned such a panic amongst the native tribes that the season's trade of the *Bannister* was lost. The master of the *Othello* was held to be responsible for that result, which was the direct and natural consequence of his wrongful and criminal act. The case was just the same as if some person had persisted in firing bullets at all and sundry who were about to enter a particular shop with the effect of driving away its customers and ruining the shopkeeper's business. Such an act could not be reasonably described as lawful but for the motive by which it was dictated.

I have already indicated that, in my opinion, no light is thrown upon the decision of the present question by *Pitt* v. *Donovan*[2] and other cases of that class. The defendant had in that case represented, contrary to the fact, that the plaintiff was insane at the time when he executed a particular deed. The communication was made to a person to whom the defendant was under a legal duty to make the disclosure if it had been true; and the defendant was

[1] 1 Peake, N. P. C. 270. [2] 1 M. & S. 639.

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in law absolved from the ordinary consequences of his having circulated a libel which was false and injurious, if he honestly believed it to be true. The law applicable in cases of that description is, I apprehend, beyond all doubt; but the rule by which the law in certain exceptional cases excuses the perpetration of a wrong, by reason of the absence of evil motive, is insufficient to establish or to support the converse and very different proposition, that the presence of an evil motive will convert a legal act into a legal wrong. *Lumley* v. *Gye*[1] is a weighty authority in this branch of the law, but it does not lend any aid to the respondents' argument. It was an action of damages against a defendant who had induced a professional singer to break her engagement with the plaintiff to his detriment, and it was resisted mainly upon the ground that the engagement broken did not constitute the relationship of master and servant between the contracting parties. That plea was overruled, and the defendant found liable. The principle of the decision (from which Coleridge, J., alone dissented) was clearly explained by Mr. Justice (afterwards Chief Justice) Erle, whose opinion is in complete accordance with the views expressed by the other learned judges who constituted the majority of the Court. He said: 'The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same.' The learned judge went on to say, in language which I have already referred to: 'It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong.' These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided. He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured. None of the learned judges made any reference to the case of

[1] 2 E. & B. 216.

Keeble v. *Hickeringill*[1], and not a single expression is to be found in their opinions tending to suggest that an injurious motive can impart a wrongful character either to a lawful act or to its procurement by means which are not in themselves illegal.

In *Bowen* v. *Hall*[2] the wrong complained of was the intentional inducing of a breach of contract to the detriment of the plaintiff, who was obviously entitled to succeed if *Lumley* v. *Gye*[3] had been well decided. According to the opinion expressed by Erle, C. J., and the other judges of the majority in that case, the defendant in *Bowen* v. *Hall*[2] had been guilty of a wrong which was in the sense of law malicious because he had knowingly procured the commission of an illegal act. The judgement in *Lumley* v. *Gye*[3] was followed by Earl Selborne and by Lord Esher (at that time Brett, L. J.), whilst Coleridge, C. J., adhered to the opposite view, which had been taken by Coleridge, J. Lord Esher, in delivering the judgement of Earl Selborne and himself, substantially affirms the reasoning of the majority in *Lumley* v. *Gye*[3]; but there are one or two sentences in his judgement relating to points with which the learned judges who decided that case did not deal, and which were not raised by the facts either of *Lumley* v. *Gye*[3] or of the case before him. His lordship said: 'Merely to persuade a man to break his contract may not be wrongful in law or fact as in the second case put by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact.' These words are obviously susceptible of two very different constructions, according as they are understood to refer to the procurement of an act which is in violation of the law, and therefore a legal wrong, or to the procurement of a lawful act. Prima facie, they would have appeared to me to refer to the procuring of an illegal act, because the assumption upon which the whole passage is framed is that there has been successful persuasion to break a contract, which is an undoubted violation of the law; and in

[1] 11 East, 574, n.
[2] L. R. 6 Q. B. D. 333.
[3] 2 E. & B. 216.

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that case there would be a malicious wrong as it is defined in *Lumley* v. *Gye*[1]. But the words have now been explained by their author to mean, not merely that the procuring of an unlawful act with intent to injure is a malicious wrong, giving a good cause of action, but that the presence of injurious intent in the mind of the procurer gives a good cause of action, although the act procured is in itself lawful. In that aspect of them, the words can only be regarded as *obiter dicta*, because no such question was raised by the circumstances of the case.

I do not think it necessary to notice at length *Temperton* v. *Russell*[2], in which substantially the same reasons were assigned by the Master of the Rolls and Lopes, L. J., as in the present case. It is to my mind very doubtful whether in that case there was any question before the Court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the Court had to consider were: (1) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*[1]. According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to *Lumley* v. *Gye*[1] if, as the Court held, there was evidence to prove it.

I am quite alive to the fact that the question which we have to decide is one of importance, and also that it has never been previously considered by this House. Having come to the conclusion, with the majority of your lordships who have heard the appeal, that the doctrine advanced by the respondents is neither sound in principle nor supported by authority, I move that the order appealed from be reversed, and judgement entered for the

[1] 2 E. & B. 216.

[2] [1893] 1 Q. B. 715.

appellant, and that the appellant have his costs of this appeal, and costs in both Courts below, including the costs of the trial. 1897.

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Lords MACNAGHTEN, HERSCHELL, SHAND, DAVEY, and JAMES OF HEREFORD concurred with the judgement of Lord WATSON; and Lords HALSBURY, L. C., ASHBOURNE, and MORRIS dissented. The order of the Court of Appeal was consequently reversed. Lord Watson.

1901. QUINN *v.* LEATHEM, L. R. 1901, A. C. 495.

It is a violation of legal right and therefore actionable to interfere with any contractual relations recognized by law if there be no sufficient justification for the interference.

A combination of two or more to injure another by coercion or interference with his liberty of action, resulting in damage to him, is actionable although there is no interference with any existing contractual relation.

Acts done in concert may be actionable where like conduct on the part of a single person would not.

The following statement of facts is taken from the judgement of Lord BRAMPTON: 1901.

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The action was originally brought in the High Court in Ireland by Henry Leathem, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons, named respectively John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leathem had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly twenty or thirty pounds' worth of the best meat; and he had in his employ as assistants several men at weekly wages.

In February, 1893, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of 'The Belfast Journeymen Butchers and Assistants' Association.' Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an

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unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leathem's men and the union.

Early in that month, however, Leathem, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. The occurrences at this meeting showed the existence of an angry feeling, and an overbearing determination on the part of the defendants to compel Leathem to employ none but union men, which culminated in the lawless conduct the subject of this action.

Leathem had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years. He was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. 'I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out and said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes.'

The chairman spoke truly; for on September 6 the secretary of the society wrote to Leathem, asking 'whether he had made up his mind to continue to employ non-union labour,' adding, 'If you

continue as at present, our society will be obliged to adopt extreme measures in your case.' He wrote also to Mr. Munce on September 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leathem & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on September 14, a very sensible reply: 'It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leathem that you wish to interfere with.' A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on September 17 he wrote to the secretary the reply of his father, 'that he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man.' September 18 brought a definite announcement from the secretary to Mr. Munce that, having failed to make a satisfactory arrangement with Mr. Leathem, they had no other alternative but to instruct his (Munce's) employés 'to cease work immediately Leathem's beef arrives.' Thereupon Mr. Munce was constrained to send to Leathem on September 20 a telegram: 'Unless you arrange with society you need not send any beef this week, as men are ordered to quit work.' On and from that day Munce took no more meat from Leathem, to his substantial loss.

Another mode adopted by several of the defendants with a view to prevent persons dealing with Leathem was the publication throughout the district of Lisburn of 'black lists' containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leathem, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to influence two other men named Davis and Hastings. With the object of further inconveniencing Leathem in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leathem.

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It is true they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But it is significant that after they had left their service they were paid by the society during the time they were out of work weekly sums of money as compensation for the wages they would have earned with Leathem. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so wrongfully broke his contract with his employers, and there was an abundance of evidence that he was induced to do that wrongful act through the unjustifiable influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leathem's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leathem because the rest were out, and promised to pay him what he had from Leathem; that he left, and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before FitzGibbon, L. J., and a special jury. The pleadings charged in the first four counts, as separate causes of action: (1) the procuring Munce to break contracts he had made with Leathem; (2) the publication by the defendants of 'black lists'; (3) the intimidation of Munce and other persons to break their contracts; and (4) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these accounts alleged that the acts complained of were done 'wrongfully and maliciously, and with intent to injure the plaintiff, and to have occasioned him actual loss, injury, and damage.' The fifth and last count charged, also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed.

The learned judge's notes of the evidence proceeded thus:—

At the close of the plaintiff's case 'O'Shaughnessy, Q.C., asked for a nonsuit or direction for the defendants on the grounds: (1) That to sustain the action a contract made with Leathem must be proved to have been made and broken through the acts of the

defendants, and that there was no evidence of such contract or breach. (2) That there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants. (3) That the ends of the defendants and the means taken by them to promote those ends as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

'I decline to withdraw the case from the jury. O'Shaughnessy, Q.C., then stated that he called no evidence for the defendants. Chambers addressed the jury for the plaintiff. O'Shaughnessy, Q.C., replied for the defendants. I charged the jury, leaving them the following questions, to which I append their findings: (1) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer: Yes. (2) Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not so to do?—Answer: Yes. (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and if so did the publication so injure him?—Answer: Yes.

'The jury found for the plaintiff, with £250 damages, of which £50 was for damages on the cause of action relating to the "black lists," and £200 was for damages on the other causes of action. I directed the jury that there was no evidence against the defendants Craig and Quinn upon the cause of action relating to the "black lists," and I directed them to assess the damages (if any) on that cause of action separately. On the above findings, on the application of Serjeant Dodd, I gave judgement for the plaintiff upon the other causes of action against all the defendants, with £200 damages, and against the defendants Davey, Dornan and Shaw upon the cause of action relating to the "black lists" for the further sum of £50 damages.'

The learned judge gave judgement for the plaintiff for £200 on the first and second causes of action against all the defendants, and for the further sum of £50 damages on the third cause of action against the defendants Davey, Dornan, and Shaw only, with costs.

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A motion was made 'to set aside the verdict and judgement and enter a verdict for the defendants, or, in the alternative, for a new trial on the ground of misdirection of the learned judge in refusing to direct for the defendants; leaving to the jury the case as against all the defendants on the evidence; and in that on the evidence no actionable wrong was shown; in that he refused to direct for the defendants in the absence of evidence of damage fit to be submitted to a jury; and on the further ground that the learned judge misdirected the jury in that he refused to tell the jury that their findings of damages should be confined to damages shown in the evidence, and, in the alternative, for a new trial on the ground that the damages were excessive and out of all proportion to the amount suggested in evidence, and that the learned judge further allowed the jury to take into account on the question of liability and damages a certain paper in the case called the "black list," and upon other grounds.' This motion was refused with costs by the Divisional Court (Andrews, J., O'Brien, J., and Sir P. O'Brien, C. J., Palles, C. B., dissenting).

In the Irish Court of Appeal (Lord Ashbourne, L. C., Porter, M. R., Walker and Holmes, L. JJ.) the decision below was affirmed with costs, the judgement for the plaintiff being amended by omitting the part as to the recovery of £50 damages [1]. Quinn alone brought the present appeal.

LORD MACNAGHTEN [2].—My Lords, notwithstanding the strong language of the late O'Brien, J., and the arguments of the Lord Chief Baron, I cannot help thinking that the case of *Allen* v. *Flood* [3] has very little to do with the question now under consideration. In my opinion, *Allen* v. *Flood* [3] laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this House were contrary to principle and unsupported by authority. Those dicta are first to be found in the judgement delivered by Lord Esher on behalf of himself and Lord Selborne in *Bowen* v. *Hall* [4]. They were repeated by Lord Esher and Lopes, L. J., in *Temperton* v. *Russell* [5]; but they were not, I think, necessary for the decision in either case. They did form the ground of decision

[1] *Leathem* v. *Craig*, [1899] 2 I. R. 667.
[2] Read by Lord Brampton in Lord Macnaghten's absence.
[3] [1898] A. C. 1. [4] L. R. 6 Q. B. D. 333. [5] [1893] 1 Q. B. 715.

in *Allen* v. *Flood*[1] in its earlier stages. But in the end the law was restored to the condition in which it was before Lord Esher's views in *Bowen* v. *Hall*[2] and *Temperton* v. *Russell*[3] were accepted by the Court of Appeal. The headnote to *Allen* v. *Flood*[1] might well have run in words used by Parke, B., in giving the judgement of an exceptionally strong Court, nearly half a century ago (*Stevenson* v. *Newnham*[4])—'*an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.*' That, in my opinion, is the sum and substance of *Allen* v. *Flood*[1] if you eliminate all matters of merely passing interest—the charge of the learned judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two different aspects in which it was presented—once for the consideration of the House, and again for the consideration of the learned judges by whom this House was assisted.

The case really brought under review on this appeal is *Temperton* v. *Russell*[3]. I cannot distinguish that case from the present. The facts are in substance identical: the grounds of decision must be the same. Now, the decision in *Temperton* v. *Russell*[3] was not overruled in *Allen* v. *Flood*[1], nor is the authority of *Temperton* v. *Russell*[3], in my opinion, shaken in the least by the decision in *Allen* v. *Flood*[1]. Disembarrassed of the expressions which Lord Esher unfortunately used, the judgement in *Temperton* v. *Russell*[3] seems to me to stand on surer ground. So far from being impugned in *Allen* v. *Flood*[1] it had, I think, the approval of Lord Watson, whose opinion seems to me to represent the views of the majority better far than any other single judgement delivered in the case. Lord Watson says[5] that he did not think it necessary to notice at length *Temperton* v. *Russell*[3], because it was to his mind 'very doubtful whether in that case there was any question before the Court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful.' Then he goes on to say: 'The only findings of the jury which the Court had to consider were: (1) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce and

[1] [1898] A. C. 1.
[2] L. R. 6 Q. B. D. 333.
[3] [1893] 1 Q. B. 715.
[4] (1853) 13 C. B. 297.
[5] [1898] A. C. 108.

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had thereby induced certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*[1]. According to the second finding the persons induced merely refused to make contracts, which was not a legal wrong on their part, but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs by means of unlawful conspiracy—a clear ground of liability (according to *Lumley* v. *Gye*[1]) if, as the Court held, there was evidence to prove it.' It must be admitted, I think, that the second reference to *Lumley* v. *Gye*[1] in the passage I have just quoted is a slip—a rare occurrence in a judgement of Lord Watson's. But I do not think that the slip (if it be a slip) impairs the effect of what Lord Watson said. Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.

Precisely the same questions arise in this case as arose in *Temperton* v. *Russell*[2]. The answers, I think, must depend on precisely the same considerations. Was *Lumley* v. *Gye*[1] rightly decided? I think it was. *Lumley* v. *Gye*[1] was much considered in *Allen* v. *Flood*[3]. But as it was not directly in question, some of your lordships thought it better to suspend their judgement. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory* v. *Duke of Brunswick*[4] is one authority, and

[1] 2 E. & B. 216.
[2] [1893] 1 Q. B. 715.
[3] [1898] A. C. 1.
[4] 6 M. & G. 205, 953.

there are others. There are valuable observations on the subject in Erle, J.'s charge to the jury in *Duffield's Case*[1] and *Rowland's Case*[2]. Those were cases of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord Fitz-Gerald, then FitzGerald, J., in *Reg.* v. *Parnell and Others*[3]. That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, L. J., and Lords Bramwell and Hannen in the *Mogul Case*[4]. A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

I have only to add that I agree generally with the judgements delivered in the Courts below, and particularly with the judgement of Andrews, J., in the Queen's Bench, and the judgement of Holmes, L. J., in the Court of Appeal. I do not think that the acts done by the defendants were done 'in contemplation or furtherance of a trade dispute between employers and workmen.' So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union.

I also think that the provision in the Conspiracy and Protection of Property Act, 1875, which says that in certain cases an agreement or combination is not to be 'indictable as a conspiracy,' has nothing to do with civil remedies.

[1] (1851) 5 Cox C. C. 404.
[2] (1851) 5 Cox C. C. 436.
[3] (1881) 14 Cox C. C. 508.
[4] L. R. 23 Q. B. D. 598; [1892] A. C. 25.

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LORD LINDLEY[1].—My Lords, the case of *Allen* v. *Flood*[2] has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs[3]. The action was tried before Kennedy, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgement against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble lords who formed the majority of your lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs[4]. There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important propo-

[1] Read by Lord Davey in Lord Lindley's absence.
[2] [1898] A. C. 1. [3] [1895] 2 Q. B. 22, 23; [1898] A. C. 3.
[4] [1898] A. C. 19, Lord Watson; 115, Lord Herschell; 147–150, Lord Macnaghten; 161, 165, Lord Shand; 175, Lord Davey; 178, Lord James.

sition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen* v. *Flood*[1]; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in *Allen* v. *Flood*[1] criminal responsibility had not to be considered. It would revolutionize criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to 'acts otherwise lawful,' i. e. to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1) what the plaintiff's rights were; (2) what the defendants' conduct was;

[1] [1898] A. C. 1.

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(3) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalizes strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen, L. J., in his admirable judgement in the *Mogul Steamship Company's Case* [1], may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen* v. *Flood* [2] to be opposed to it.

If the above reasoning is correct, *Lumley* v. *Gye* [3] was rightly

[1] L. R. 23 Q. B. D. 613, 614.
[2] [1898] A. C. 1.
[3] 2 E. & B. 216.

decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton* v. *Russell*[1] ought to have been decided and may be upheld on this principle. That case was much criticized in *Allen* v. *Flood*[2], and not without reason; for, according to the judgement of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen* v. *Flood*[2]. But in *Temperton* v. *Russell*[1] there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen* v. *Flood*[2]. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and

[1] [1893] 1 Q. B. 715. [2] [1898] A. C. 1.

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there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your lordships have to deal with a case, not of *damnum absque iniuria*, but of *damnum cum iniuria*.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Co.* v. *MacGregor*[1] and *Allen* v. *Flood*[2], and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen* v. *Flood*[2] in favour of the appellant. His sheet-anchor is *Allen* v. *Flood*[2], which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man

[1] [1892] A. C. 25. [2] [1898] A. C. 1.

without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen* v. *Flood*[1] Lord Herschell[2] expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen* v. *Flood*[1] there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is prima facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where

[1] [1898] A. C. 1. [2] [1898] A. C. at pp. 128, 138.

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one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to *Vegelahn* v. *Guntner*[1], where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Co.*[2] that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen* v. *Flood*[3] emphasizes the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society* v. *Glasgow Fleshers' Association*[4], which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to show.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another

[1] 167 Mass. 92.
[2] [1892] A. C. 25; L. R. 23 Q. B. D. 598.
[3] [1898] A. C. 1.
[4] 35 Sc. L. R. 645.

set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is prima facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to, which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in *Kearney* v. *Lloyd*[1]. This is fully shown in the various judgements now under review.

In *Huttley* v. *Simmons*[2] the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

[1] 26 L. R. Ir. 268.

[2] [1898] 1 Q. B. 181.

DEFAMATION.

I. LIBEL.

1882. THE CAPITAL AND COUNTIES BANK, LIMITED *v.* HENTY, L. R. 7 App. Cas. 741.

A libel is a written statement, published without lawful justification, calculated to convey to those to whom it is published an imputation on the plaintiff, injurious to him in his trade or calling, or holding him up to hatred, contempt, or ridicule. The words of a libel are to be construed prima facie according to their ordinary and natural meaning; but the plaintiff may allege by an *innuendo*, and prove that, under the circumstances of their publication, they were calculated to convey a special meaning which is libellous.

It is the duty of the judge to say whether the words are capable of bearing the meaning ascribed to them by the *innuendo*, or any defamatory meaning, but when the judge is satisfied of that, it is for the jury to say whether the words do in fact bear that meaning.

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THE CAPITAL AND COUNTIES BANK, LD. *v.* HENTY.

APPEAL from a judgement of the Court of Appeal (Brett and Cotton, L. JJ., Thesiger, L. J., dissenting) in favour of the defendants, reversing a judgement of the Common Pleas Division (Grove and Denman, JJ.).

LORD BLACKBURN.—My Lords, the plaintiffs' claim is thus stated: '(1) The plaintiffs are bankers, and the defendants are brewers. (2) The defendants falsely and maliciously wrote and published of the plaintiffs the letter following: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). Westgate, Chichester, December 2, 1878." Meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers.'

The statement of defence sets out the circumstances under which the defendants allege that the letter was published, and proceeds: '(9) The defendants thereupon, as they lawfully might do, sent to

their said tenants the letter in paragraph 2 of the statement of claim set out, which is the writing and publishing complained of, and for which the present action is brought. The defendants deny that the said letter under the circumstances aforesaid is a libel. (10) The defendants say that the occasion of sending the said letter to their tenants as aforesaid was privileged. (11) The defendants deny the innuendo alleged in paragraph 2 of the statement of claim, and say that the said letter does not bear the said alleged meaning.

On the trial evidence was given on both sides, and on the proof being completed the case was left to the jury, who did not agree, and were discharged. The plaintiffs desire that the case should go for trial before another jury. The defendants' contention is, that they are entitled to judgement on the ground that, if the jury had found in favour of the plaintiffs every circumstance relating to the publication which the evidence could prove, and even though the jury had found that, in their opinion, the letter was libellous, the Court ought to come to the conclusion that the letter published under those circumstances was no libel, and acting on its own conclusion give judgement for the defendants, not setting that verdict aside as not satisfactory, but letting it stand and giving judgement for the defendants, notwithstanding that verdict. If this is right, it follows that the case ought not to be sent to another jury.

The decision of the cause depends, first, on the question what is the province of the Court in an action for libel, and whether, where the writing is such that opinions might differ as to whether it is a libel or not, the Court can give judgement for the defendant, on the ground that, though the jury have found that, in their opinion the writing is a libel, the Court do not think it made out to be a libel; that is a question of great public interest; secondly, whether, supposing that this can be done, the state of the evidence in this case as to the publication is such that the Court ought to come to the conclusion that this is no libel. This is of importance to the parties, but except in so far as it may illustrate the meaning of the first general proposition, it is not of general importance. I have had and still have very great difficulty in making up my mind on this second branch of the case. I will first state my opinion on the first question.

A libel for which an action will lie, is defined to be a written

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statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. It must be shown by evidence that there was a writing, and that it was published. I shall afterwards say something as to what publications are privileged, so as to afford a lawful justification or excuse for the publication, though calculated to convey a libellous imputation. But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.

I think that from the earliest times it has, by the law of England, been the province of the Court to say whether words published in writing were a libel or not; and in order that a Court of error might have before it the materials for enabling it to say whether the decision of the Court below was right or not, the plaintiff was, by the old rules of pleading, required to place all those materials, on which he relied, upon the record. The words themselves must have been set out in the declaration or indictment, in order that the Court might be able to judge whether they were a libel or not. And this still remains the law: see *Bradlaugh* v. *The Queen*[1]; *Harris* v. *Warre*[2].

In construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he

[1] L. R. 3 Q. B. D. 607. [2] L. R. 4 C. P. D. 125.

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may have written in levity only. As was said in the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill, I think quite justly, no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport.

If there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that those must be stated on the record, in order to enable the Court to judge whether the words understood with reference to those circumstances could not be looked at in favour of the plaintiff. Great nicety was required in setting out those circumstances, and the rule of pleading has been altered in that respect by the Common Law Procedure Act, 1852, and the Judicature Act; but the law which gave rise to the old mode of pleading has not been altered by those Acts. I shall say more as to the effect of this change in the mode of pleading afterwards. It never was disputed that there was much which could only be decided by the jury. Whether the words as published bore the meaning alleged where there was an innuendo, or any libellous imputation where there was no innuendo, was a question which the defendant could raise on the general issue, and the jury must decide that question when raised.

But there were a series of decisions, the last and most important of which was the famous case of the Dean of St. Asaph. The fullest and best report of that case is that prepared by Lord Glenbervie, and published under the name of *R.* v. *Shipley*[1]. The head-note, I think very accurately, states what was decided by the majority of the Court. 'On the trial of an indictment for a libel the only questions for the jury are the fact of publication, and the truth of the innuendoes. The question of libel or no libel is necessarily a question of law for the sole consideration of the Court out of which the record comes, and on which the judge at the trial is not called upon to give his opinion to the jury.' Lord Mansfield laid it down that 'by the constitution the jury ought not to decide the question of law whether such writing, of such a meaning, published without a lawful excuse, be criminal. They cannot decide it against the defendant, because after verdict it remains open upon the record; therefore it is the duty of the judge to advise the jury

[1] 4 Doug. 73.

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to separate the question of fact from the question of law; and as they ought not to decide the law, and the question remains entire upon the record, the judge is not called upon necessarily to tell them his own opinion. It is almost peculiar to the form of prosecution for a libel that the question of law remains entirely for the Court upon the record, and that the jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases. It finds all which belongs to the jury to find, and finds nothing as to the question of law. Therefore when a jury have been satisfied as to every fact within their province to find, they have been advised to find the defendant guilty, and in that shape they take the opinion of the Court upon the law[1].'

Willes, J., dissented from the reasons given by Lord Mansfield, though agreeing in his conclusion that there should not be a new trial, and that the judgement of the Court should be given on the verdict found in that case, as on a verdict of guilty. And it is worth while to point out in what respect he dissented. Willes, J., said, 'I conceive it to be the law of this country that the jury, upon a plea of not guilty, or upon the general issue, upon an indictment or information for a libel, have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publication. Secondly, I conceive it to be law that if, upon such examination, the jury should, contrary to the judge's direction, acquit the defendant generally, such a jury are not liable either to attaint, fine, or imprisonment; nor can this Court set aside the verdict of deliverance by a new trial, or by any other means whatsoever[2].' He proceeds to show that he thought that a direction to the jury, that if they were satisfied of the truth of the innuendoes and publication they were bound in point of law to find the defendant guilty, though sanctioned by many great authorities, was wrong. He says: 'So far as my opinion goes, I am still free to confess I think it is fit, it is meet and prudent that the jury should receive the Law of Libels from the Court. But if my concession is extended an iota further, to mean that under all the circumstances, if the innuendoes are proved, the jury are bound to find, and must find, the defendant guilty, I must beg leave to repudiate the idea; as upon the maturest

[1] 4 Doug. 164, 165. [2] 4 Doug. 171.

consideration I say the jury are not bound to find the defendant guilty, but may give a general verdict of acquittal without being obliged to give their reasons[1].'

It seems to me clear that whilst Lord Mansfield held that the question of libel or no libel was one exclusively for the Court, Willes, J., held that it was also a question for the jury; but he did not hold it to be a question exclusively for the jury. On the contrary, whilst holding that if the jury found the defendant not guilty it was conclusive in his favour, he expressly held that after a verdict of guilty it still was competent for the defendant to take the opinion of the Court as to whether the publication was libellous or not. He says (p. 176), 'If it' (the tract which the Dean had published) 'contains nothing but what Lord Somers would have approved, and the Convention Parliament have warranted' (which is what the Dean had asserted in an advertisement) 'then the publication is harmless and inoffensive; but if it tends to excite the people to take arms, to alter the established representation of this country without the consent of Parliament, it may not only be seditious but nearly treasonable. I give no opinion upon this head, as this will be a proper subject of discussion if a motion is made in arrest of judgement.' A motion was made in arrest of judgement, and the judgement was arrested. I have never seen any report of the grounds on which the judgement was arrested.

It is no longer material whether Lord Mansfield or Willes, J., was right in his view of the law as it stood in 1784, for by 32 Geo. III, c. 60 it is enacted by the first section what the law shall be in future. The Legislature has adopted almost the words and quite the substance of that part of Willes, J.'s, judgement which I have first quoted; and from that time, A.D. 1792, there can be no doubt that a defendant cannot be convicted of libel unless the jury find that the tendency of the publication was libellous. But the Legislature, passing an enactment in favour of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against the defendants. Nor did they enact that the judge might not in this, as in other criminal cases, direct the jury to acquit because he thought that the case had failed in law; it would, I think, have been very injudicious to do so, for jurors are sometimes excited against defendants, though

[1] 4 Doug. 174, 175.

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more commonly they are excited in their favour. And the Legislature by the fourth section provided that the defendant should still, though found guilty by the jury, have the power to take the opinion of the Court on the question of law, by moving in arrest of judgement as before that Act.

The case of *R.* v. *Shipley*[1] was a criminal proceeding at the instance of the Crown, and 32 Geo. III, c. 60 is in terms confined to such proceedings. But though no doubt the Court has more power to set aside verdicts in civil cases, there is no reason why the functions of the Court and jury should be different in civil proceedings for a libel, and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.

It certainly had always been my impression that there was a difference between the position of the prosecutor, or plaintiff, and that of the defendant. The onus always was on the prosecutor or plaintiff to show that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the Court and the jury to decide for him.

Now it seems to me that when the Court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges might, not unreasonably, hold such words to be libellous. In fact whenever a verdict has passed against a defendant in a case of libel, and judgement has been given in the Court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the Court below have gone wrong: but they are not called upon to say that the words were incapable of conveying the

[1] 4 Doug. 73.

libellous imputation; it is enough if they can make out, to the satisfaction of the Court in error, that the onus of showing that they do convey such an imputation is not satisfied; and there are numerous cases in which, after a verdict for the plaintiff and judgement for him, that judgement has been set aside in error.

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The Common Law Procedure Act, 1852, s. 61, was intended to remove the difficulties which a plaintiff had in putting a real cause of action on the record, with sufficient technical precision. But it was not intended to alter the law, or to deprive the defendant of his right to ask the Court to say that words alleged to be a libel, or actionable slander, though found by the jury to be so, were not so in the judgement of the Court. It deprived him of his right to move in arrest of judgement, for the materials, on which the question whether the words written or spoken were used in the defamatory sense has to be decided, are no longer on the record. But when the proof is complete, and all that can be properly found on that proof in favour of the plaintiff is found for him, the Court have, I think, exactly the same power that they had before, and if they are of opinion that if all which could be found had been put on the record under the old system, the judgement would have been arrested, they should give judgement for the defendant. This was done, and I think rightly done, in *Mulligan* v. *Cole* [1].

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Lord Blackburn then proceeded to deal with the facts of the case, and in the result was of opinion that the plaintiffs had not satisfied the onus which was upon them of showing that the publication was libellous.

LORD SELBORNE, L. C.—I do not understand any of the learned judges in the Courts below to have been of opinion (nor do I think it is the opinion of any of your lordships) that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (i. e. in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts

[1] L. R. 10 Q. B. 549.

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calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law.

In *Sturt* v. *Blagg*[1] Wilde, C. J., said: 'It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.' If the judge, taking into account the manner and the occasion of the publication and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury. In deciding on the question whether the words are capable of that meaning he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons.

The alleged libel, in the present case, is a printed circular sent through the post by the defendants (brewers at Chichester) to certain of their own tenants and customers, giving them notice that the defendants 'would not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank.' The meaning ascribed to this document by the innuendo is, 'that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers.' The question is, whether there was evidence to be left to the jury in support of that innuendo. From the words, standing by themselves, it appears to me to be impossible to collect such a meaning, on any known principle of construction. By construction, merely, the only conclusion to be arrived at is, that they mean exactly what they say, viz., that the defendants had come to a resolution not to receive in payment of any moneys due or to become due to them, from the persons to whom that circular was addressed, cheques drawn on any of the branches of the plaintiffs' bank. For such a resolution they might have had various motives and reasons, good, bad, or indifferent.

[1] 10 Q. B. 908.

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There was no evidence of any extrinsic fact affecting the reputation or credit of the plaintiffs' bank at the time which could be connected with the circular, so as to give it a meaning to those who read it which it might not otherwise have had. I cannot but think that under the old system of pleading a statement of some extrinsic facts of this nature on the record would have been necessary to support the innuendo, having regard to the absence of any sufficient ground for it in the words of the document; and this for reasons not technical (*Goldstein* v. *Foss*[1]; *Hearne* v. *Stowell*[2]; *Capel* v. *Jones*[3]). And although no such matter of inducement need now be stated on the record, it seems to me that without some evidence of facts which, when connected with the words of the document, would justify the meaning imputed to it, such a case ought not to go to a jury.

Lords WATSON and BRAMWELL concurred and Lord PENZANCE differed, and the appeal was dismissed.

1900. VIZETELLY *v.* MUDIE'S SELECT LIBRARY, LIMITED, L. R. 1900, 2 Q. B. 170 (C. A.).

Prima facie every one who disseminates a libel, whether innocently or not, is as liable to an action as the originator of it. There is, however, an exception in favour of one who innocently disseminates a book or newspaper when he neither knows nor ought to have known that such book or newspaper contained any libellous matter.

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Application for judgement or a new trial in an action tried before Grantham, J., with a jury.

The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very extensive business. The defendants in their defence stated that, if they sold or lent the book in question, they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know and had no ground for supposing that it was likely to contain libellous matter; and that under the circumstances so stated they contended that they did not publish the libel.

The plaintiff had been employed by Mr. Gordon Bennett of the

[1] 6 B. & C. 154. [2] 12 A. & E. 719. [3] 4 C. B. 259.

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New York Herald to proceed as the head of an expedition to Africa to search for Sir H. Stanley, who was then engaged in an expedition for the rescue of Emin Pasha, and to furnish news to the *New York Herald* on the subject. He met Stanley and Emin Pasha in Africa on their way down to the coast at a place called Msura; and subsequently sent off letters to Mr. Gordon Bennett. Messrs. Archibald Constable & Co., a well-known firm of publishers, in October, 1898, published in this country a book called *Emin Pasha: his Life and Work*, which was a slightly abridged English version of a work published in Germany that purported to be compiled from the journals, letters, and scientific notes of Emin Pasha and from official documents. It contained the following passage purporting to be an extract from Emin Pasha's diary: 'Vizetelly sent off three messengers to-day to the coast, each with a bulky letter. However, as he is not yet sober, he cannot surely have written them himself, and the solution of the problem is, as Dr. Parke tells us, simply that Stanley had the correspondence ready, and knocked it down to the highest bidder, Vizetelly, that is, Gordon Bennett, and quite right too.' This was the libel complained of. It was not suggested that the statements contained in it were true. The plaintiff on becoming aware of the libel brought an action for libel against Messrs. Constable and Co., which was settled by their paying £100 damages, apologizing, and undertaking to withdraw the libel from circulation. In the issue of the *Publishers' Circular*, a recognized medium for trade advertisements of the kind, for November 12, 1898, a notice was inserted to the effect that Messrs. Archibald Constable & Co. requested that all copies of vol. i. of *The Life and Work of Emin Pasha* might be returned to them immediately, as they wished to cancel a page, and insert another one in its place, and stating that they would of course defray the carriage both ways, if desired. A similar notice was inserted on the same date in the *Athenæum* newspaper, a well-known medium of communication among literary people. In March, 1899, it came to the plaintiff's knowledge that the defendants were lending copies of the work as originally published to subscribers, and also selling surplus copies of the same, and he thereupon commenced the action against them. It appeared that none of those engaged in the conduct of defendants' business had seen the before-mentioned notices in the *Publishers'*

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Circular and *Athenæum*, though the defendants took in those papers. Mr. A. O. Mudie, one of the defendants' two managing directors, who was called as a witness for the defendants, gave evidence to the effect that the defendants did not know when they circulated and sold the book in question that it contained the passage complained of. He stated that the books which they circulated were so numerous that it was impossible in the ordinary course of business to have them all read, and that they were guided in their selection of books by the reputation of the publishers, and the demand for the books. He said in cross-examination that there was no one else in the establishment besides himself and his co-director who exercised any kind of supervision over the books; that they did not keep a reader or anything of that sort; that they had had books on one or two occasions which contained libels; that that would occur from time to time; that they had had no action brought against them for libel before the present action; and that it was cheaper for them to run an occasional risk of an action than to have a reader. The learned judge in summing up in substance directed the jury to consider whether, having regard to the above-mentioned evidence, the defendants had used due care in the management of their business. The jury found a verdict for the plaintiff, damages £100.

The defendants applied for judgement or a new trial on the ground that there was no evidence on which a verdict could be found or judgement entered for the plaintiff, and also on the grounds that the judge insufficiently directed the jury on the question what amounted in law to the publication of a libel, and on the question of the burden of proof as to publication and of the duty of the defendants and their alleged negligence, and that the verdict was against the weight of the evidence.

ROMER, L. J.—The law of libel is in some respects a very hard one. In the remarks which I am about to make I propose to deal only with communications which are not privileged. For many years it has been well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of being altered or modified, and the Courts, in endeavouring to mitigate the hardship resulting from

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it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the Courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels. Then we have the case of *Emmens* v. *Pottle*[1], in which vendors of newspapers in the ordinary course of their business sold a newspaper which contained a libel. It was clear that selling a document which contained a libel was prima facie a publication of it, but the Court there held that there was no publication of the libel under the circumstances which appeared from the special findings of the jury, those findings being (1) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2) that it was not by negligence on the defendants' part that they did not know that there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. Lord Esher, M.R., in this Court was of opinion that, though the vendors of the newspapers, when they sold them, were prima facie publishers of the libel, yet, when the special findings of the jury were looked at, the result was that there was no publication of the libel by the defendants. Bowen, L. J., put his judgement on the ground that the vendors of the newspapers in that case were really only in the same position as an ordinary carrier of a work containing a libel. The decision in that case, in my opinion, worked substantial justice; but, speaking for myself, I cannot say that the way in which that result was arrived at appears to me altogether satisfactory; I do not think that the judgements very clearly indicate on what principle courts ought to act in dealing with similar cases in future. That case was followed by other cases, more or less similar to it, namely, *Ridgway* v. *Smith & Son*[2], *Mallon* v. *W. H. Smith & Son*[3], and *Martin* v.

[1] L. R. 16 Q. B. D. 354. [2] (1890) 6 Times L. R. 275.
[3] (1893) 9 Times L. R. 621.

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Trustees of the British Museum[1]. The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in showing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury. Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did. The only remaining question is whether the summing-up and direction of the learned judge were such as would justify us in sending down the case for a new trial. I find no misdirection in point of law, and though, with great respect to the learned judge, I do not think that all he said was correct, or justified by the evidence, the jury had the facts fully put before them, and on the whole I do not think that there was anything in the summing-up which caused the jury to come to an erroneous conclusion, or which would justify us in granting a new trial. For these reasons I think the application must be dismissed.

[1] (1894) 10 Times L. R. 338.

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A. L. SMITH and VAUGHAN-WILLIAMS, L. JJ., delivered judgement to the same effect, and the application was dismissed.

1887. MERIVALE *v.* CARSON, L. R. 20 Q. B. D. 275 (C. A.).

Comment which is confined to relevant criticism upon a matter of public interest, and which does not go beyond, to attack private character or indulge in mere invective, is no libel.

Such a comment is called in law 'fair comment.'

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Appeal by the defendant against the refusal of a Divisional Court (Mathew and Grantham, JJ.) to allow a new trial of the action, or to enter judgement for the defendant.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and his wife were the joint authors of a play called *The Whip Hand*. The defendant was the editor of a theatrical newspaper called *The Stage*. Early in May, 1886, the play was performed at a theatre in Liverpool. On May 7 a criticism of the play was published in the defendant's newspaper. The part of the article charged in the statement of claim as libellous was as follows:—'*The Whip Hand*, the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable-lout. And so the Marquis Colonna in *The Whip Hand* is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier.' The innuendo suggested was that the article implied that the play was of an immoral tendency.

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It was admitted that there was no adulterous wife in the play.

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgement for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

BOWEN, L. J.—We must begin with asking ourselves, what is the true meaning of the words used in the alleged libel? We have the benefit of the machinery which the law gives—the verdict of a jury—for ascertaining the meaning, and it must now be taken to have been conclusively settled, that the writer of the criticism has imputed to the plaintiffs that the story of their play turns in its main incident upon an adulterous wife, and in such a way as not to lead any one to suppose that the plaintiffs objected to the adultery, but, on the contrary, that they had treated the adultery as a spicy incident in the play without expressing any opinion as to its morality. It has been admitted by the defendant that the play does not in fact contain any adulterous wife, that there is no incident of adultery in it, and therefore it is not open to the suggestion that the plaintiffs have treated adultery lightly in such a way as to tend to immorality. These are the facts.

What then is the law applicable to them? We must see, first, what is the question which ought to have been left to the jury on this assumption of the meaning of the article, and then whether it was in fact left to them, and whether there was any miscarriage on their part. I take precisely the same view as the Master of the Rolls with regard to the way in which the word 'privilege' ought to be used. The present case is not, strictly speaking, one of 'privileged occasion.' In a legal sense that term is used with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys—the right of publishing a written criticism upon a literary work which is offered to public criticism.

It is true that a different metaphysical exposition of this common right is to be found in the judgement of Willes, J., in *Henwood* v. *Harrison*[1]. That learned judge and the majority of the Court of Common Pleas seem to have treated this right as a branch of the

[1] L. R. 7 C. P. 606.

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general law of privilege, and to have found a justification for the use of the word 'privilege' in the subject-matter of the criticism, although there is no limit of the number of the persons entitled to make the criticism. With great respect to Willes, J., I agree with the Master of the Rolls that this is not so good an exposition of the right as that which is given by Blackburn, J., and Crompton, J., in *Campbell* v. *Spottiswoode* [1]. But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one. But, among other reasons, why I prefer the view of Blackburn, J., and Crompton, J., is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell* v. *Spottiswoode* [1] (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of 'fair criticism'? The criticism is to be 'fair,' that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls 'fair,' and, although we cannot find in any decided case an exact and rigid definition of the word 'fair,' this is because the judges have always preferred to leave the question what is 'fair' to the jury. The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgement of Lord Tenterden, C. J., in *Macleod* v. *Wakley* [2], where he said, 'Whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticizing the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel.' It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

[1] 3 B. & S. 769.

[2] 3 C. & P. at p. 313.

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In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticizing. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell* v. *Spottiswoode* [1] was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told that, if it attacked the private character of the author, it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond the limits of fair criticism.

Applying the law to the present case, we have to see whether the learned judge misdirected the jury, having regard to their finding as to the true construction of the article. Their construction of the words of the article could not have been affected by what he said to them about the meaning of 'fair criticism.' The alleged libel stated that the story of the plaintiffs' play turned upon adultery. In a case of manifest misdescription such as this the judge is not bound to go into all the *minutiae* as if the libel had been of a different character, and his summing-up must be read with reference to this fact. I have read through the summing-up of Field, J., and, though I do not think that his language was altogether ex[illegible], yet what possible harm could it have done having [illegible] facts of the case? The jury had to deal with a [illegible] of positive misdescription, a question not of opinion, but of fact. [illegible] fall clearly beyond the limits of fair criticism? Cou[illegible] since the Judicature Act set aside the verdict of the j[illegible] because the language of the learned judge was not e[illegible] which he would have used if he had written his sum[illegible] Assuming the interpretation the jury put on the meani[illegible]

[1] 3 B. & S. 769.

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words to be correct, as we must assume, I entertain no doubt as to the correctness of the remainder of the verdict. And, even if the view of the law as to privilege which I do not adopt were the right view, I do not think it would make any difference in the present case, because, the misrepresentation being clear, the writer having not merely said that the play had an evil tendency, but having imputed to the authors that it was founded on adultery when there is no adultery at all in it, the jury would have inferred, if the question had been left sufficiently to them, that the writer was actuated by a malicious motive; that is to say, by some motive other than that of a pure expression of a critic's real opinion.

LORD ESHER, M. R., also delivered judgement to the like effect, from which the following extract is taken:—What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgement must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But, when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: 'If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendants.' He limit, and, I think, rightly. Mere exaggeration, tion, would not make the comment unfair. ıion expressed may be in point of truth, or writer, it may still be within the prescribed ıich the jury must consider is this—would rejudiced he may be, however exaggerated ave said that which this criticism has said

of the work which is criticized? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all.

Appeal dismissed.

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NOTE.—'No doubt in most cases of this class there are expressions in the impugned document capable of being interpreted as falling outside the limit of honest criticism, and, therefore, it is proper to leave the question to the jury, and in all cases where there may be a doubt it may be convenient to take the opinion of a jury. But it is always for the judge to say whether the document is capable in law of being a libel. It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel—i. e., that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgement for the defendant' (per Collins, M.R., in *McQuire* v. *Western Morning News Co.*, 1903, 2 K. B. at p. 110).

Notwithstanding certain expressions of Esher, M.R., in the principal case, and of Collins, M.R., in the passage cited it may be doubted whether 'honesty' or 'bona fides' are really relevant to the question. It is now settled that 'fair comment' is not a branch of the law of privilege, but a mere traverse of the defamatory nature of the alleged libel. Therefore, having regard to the decision in *Allen* v. *Flood*, v. s., it is difficult to see how a comment which does not in itself exceed the limits of fair criticism can be held to be libellous merely because it is written with a malicious intent.—[ED.]

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Statements, whether written or verbal, made by judges upon the bench, by counsel at the bar, by witnesses in giving evidence, in a duly constituted court, by members of the Legislature in either House of Parliament, or by ministers of the Crown in advising the sovereign, are absolutely privileged and cannot be inquired into in an action for defamation, however false or defamatory, and even when instigated by actual malice.

Bill of exceptions to the ruling of Blackburn, J., in an action for libel tried in the Court of Queen's Bench at Westminster, on February 4, 1871.

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February 1. The judgement of the Court (Kelly, C. B., Martin, Bramwell, Channell, Pigott, and Cleasby, BB.; Byles, Keating, Brett, and Grove, JJ.) was delivered by

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KELLY, C. B.—The plaintiff in this case, a colonel in the army, having been reported to have exhibited on several occasions a want of deference to some of his superior officers, and to have been guilty of other unoffieerlike conduct, and also to have made certain charges against several of his brother officers; His Royal Highness the commander-in-chief was pleased to direct that a court of inquiry should be assembled, and that the matters should be inquired into and reported upon to him. A court of inquiry was held, and the defendant Lord Rokeby, also an officer of rank in the army, was required to attend, and did accordingly attend, as a witness before this Court. Being examined as a witness, he gave certain vivâ voce evidence; and, when the examination was closed, handed in to the Court a written paper, containing in substance a repetition of the evidence which he had given by word of mouth, with some additions upon the same subject; and this paper was received by the Court, and it must be presumed formed part of the minutes of the proceedings. A report was duly made to the commander-in-chief, and certain consequences followed, but which do not appear in evidence on this record. It is, however, stated that the plaintiff applied to the proper military authority for a Court-martial on the defendant, and that such military authority, having power to grant or to refuse the said Court-martial, did refuse to summon or allow the same to be held. Thereupon the plaintiff brought the present action, in which, in the first count, he charges the written paper above referred to as a libel; and, in the second count, the vivâ voce evidence as verbal slander.

The above facts appear to have been admitted at the trial; and the counsel for the plaintiff further offered to prove that the defendant, in delivering in the written statement and giving the vivâ voce evidence, acted *malâ fide* and with actual malice, and that these statements were made without any reasonable or probable cause, and with a knowledge on the part of the defendant that they were false. I need scarcely observe that neither the charge of malice and wilful falsehood, alleged on the part of the plaintiff to be capable of proof against the defendant, nor any charge of misconduct of any kind reflecting upon the plaintiff is to be taken to be true: such charges having been merely assumed to be proveable for the purposes of argument, and in order to raise the questions to be determined in this cause. Upon these admissions

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and allegations the defendant's counsel insisted that the action was not maintainable, and the learned judge who tried the cause declared his opinion that the evidence so offered on the part of the plaintiff was immaterial and irrelevant, and that as matter of law the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer in the course of a military inquiry, in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *malâ fide* and with actual malice, and without any reasonable and probable cause, and with the knowledge that the statements made and handed in by him as aforesaid were false. Thereupon the counsel for the plaintiff excepted to the said ruling of the learned judge, and this Court is now called upon to decide whether such exception shall be allowed.

We are all of opinion that the ruling of the learned judge at the trial was right, and that the exception must be disallowed.

The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.

The principle which pervades and governs the numberless decisions to that effect is established by the case of *Floyd* v. *Barker*[1], and many earlier authorities from 27 Edw. III, pl. 15; 9 Hen. IV, 60, pl. 9; and 9 Edw. IV, 3, pl. 10, down to the time of Lord Coke; and which are to be found collected in *Yates* v. *Lansing*[2] and in *Revis* v. *Smith*[3]. These two decisions, *Yates* v. *Lansing*[2] and *Revis* v. *Smith*[3], are themselves direct authorities that no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice. Lord Mansfield, in *Reg.* v. *Skinner*[4], observes: 'Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office.' Again, *Astley* v. *Younge*[5] is an authority directly in point, that no action

[1] 12 Co. Rep. 23.
[2] 5 Joh. 282; 9 Joh. 395.
[3] 18 C. B. 126; 25 L. J. (C. P.) 195.
[4] Lofft, 55.
[5] 2 Burr. 807.

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lies upon a false affidavit sworn in a proceeding before justices of the peace or upon a calumnious statement made in answer to such an affidavit, Lord Mansfield, there observing: 'Show that a matter given as evidence in a court of justice may be prosecuted in a civil action as a libel. The Court indeed, before which such evidence is given, may censure it.' And further on: 'And as to the reason of the thing, there can be no scandal if the allegation is material, and if it is not, the Court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record if it be upon the record.' It has been argued, however, that if the matter deposed to be false to the knowledge of the deponent, an action may be maintained; and the argument is founded upon a note of Holroyd, J., in *Hodgson* v. *Scarlett*[1]. But the whole question is set at rest by the decision of the Exchequer Chamber in *Henderson* v. *Bromhead*[2]. There, as here, the plaintiff offered to prove that the matter sworn to was not only malicious and irrelevant, but false to the knowledge of the witness. But Erle, C. J., and the whole Court were unanimous that no action was maintainable. Crompton, J., expressly held that, 'no action lies for words spoken or written in the course of any judicial proceeding,' and that 'the rule is inflexible that no action will lie for words spoken or written in the course of giving evidence.' And Crowder, J., referring to *Revis* v. *Smith*[3], held that 'it was a matter of public policy that no such action should be maintained.'

Finally, in *Dawkins* v. *Lord Rokeby*[4], an action between the present parties tried before the late Mr. Justice Willes, that most learned and lamented judge, in alluding to the very evidence given by the defendant before the court of inquiry, which is the subject of this action, observed: 'What he stated before the Court he stated in the capacity of a witness; and assuming, apart from the reasons which I have already given, that no action would lie against him for what he did, there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would speak in fear of litigation;

[1] 1 B. & Ald. at p. 245 (see per Alderson, B., in *Gibbs* v. *Pike*, 9 M. & W. at p. 358).
[2] 4 H. & N. 569; 28 L. J. (Ex.) 360.
[3] 18 C. B. 126; 25 L. J. (C. P.) 195.
[4] 4 F. & F. 806.

and no man who is called on to give evidence would be safe from some troublesome action being brought against him.' Upon all these authorities it may now be taken to be settled law, that no action lies against a witness upon evidence given before any court or tribunal constituted according to law.

But it is insisted, on the part of the plaintiff, that a court of inquiry is not a court of law or a court of justice, and that witnesses before such a court are not within the protection of the law. On the other hand, it is contended, on the part of the defendant, that the evidence given by an officer in the army before a court of inquiry is a privileged communication, and cannot by law be made the subject of an action for defamation. It is further objected that any such evidence is part and parcel of the minutes of the proceedings of the Court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and as such ought not, except by Her Majesty's command or permission, to be produced, and are, therefore, wholly inadmissible in evidence; and we are all of that opinion, and hold that on that ground also the exception must be disallowed.

It may be convenient to consider this point at once; for if it appear that the whole matter upon which the action is founded, whether the written statement handed into the Court or the oral testimony of the defendant, together with all secondary evidence of the one or the other, is inadmissible by law, and ought not to have been received or permitted to be read at the trial, it is difficult to see how the action can be maintained. A court of inquiry, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is, nevertheless, a court duly and legally constituted, and recognized in the articles of war and many Acts of Parliament.

The 12th section of the articles of war provides: 'That if any officer shall think himself wronged by his commanding officer, and shall, upon due application made by him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state for war, to make his report to us thereupon, in order to receive our further directions.'

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Now the mode in which the commander-in-chief examines into any such complaint is by instituting a court of inquiry. A court, therefore, so called into existence has all the qualities and incidents of a court of justice. It is convened, in pursuance of this provision, and so under the express authority of Parliament, and of the Queen's regulations, which, as set forth upon this record, provide as follows: 'A court of inquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such court may be directed to investigate and report on any matter that may be brought before it; but it has no power to administer an oath nor to compel the attendance of witnesses not military.' From this it follows that a military witness is compellable to attend and to give evidence. The regulations proceed: 'A court of inquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the commanding officer to collect and to record information only, or it may be required to give an opinion also on any proposed question. The proceedings are to be recorded in writing as far as practicable in the form prescribed for Courts-martial, signed by each member, and forwarded to the convening authority' (in this case the commander-in-chief) 'by the president.'

Under these regulations officers in the army, if required by competent military authority to attend, are compellable to attend and give evidence, not, indeed, by means of any known legal process, or under any penalty imposed by law, but in obedience to the duty they owe to the sovereign, and under peril of dismissal at the pleasure of the sovereign in case of disobedience. The evidence so given is in truth a communication made at the command of the sovereign, through the commander-in-chief, by a military officer, to an assembly consisting of other military officers upon a military subject, to be reported to the commander-in-chief, and by him to the sovereign; and all this in strict conformity to the Queen's regulations. There is, therefore, no sound reason or principle upon which such a witness, called upon to give evidence in such a court, should not be entitled to the same protection and immunity as any other witness in any of the courts of law or equity in Westminster Hall. He is equally

compellable to appear and give evidence, and punishable in case of refusal. And it would be unreasonable and unjust to hold him liable to a heavy punishment if he refuse to answer the question put to him, and liable to an action at law for damages if he answers them and his answers happen to reflect upon the character of another. It may be said that if the evidence given in a court of law be false, the witness is indictable for perjury; and that if he go out of his way to slander another by uttering irrelevant and defamatory matter, he may be fined or imprisoned for a contempt of court.

But, besides that no punishment inflicted on a false witness affords compensation or redress to the party injured, a witness before a court of inquiry, if he defames the character of another by false and malicious statements, whether relevant or not to the matter inquired into, is equally subject to punishment with a witness in a court of law, and may be put upon his trial before a Court-martial, and if found guilty may be dismissed the service, or otherwise dealt with as justice may require. And in this very case the plaintiff sought redress by demanding a Court-martial upon the defendant. And we must presume that his complaint was shown to be groundless inasmuch as the Court-martial was refused. And it was upon this refusal, as it should seem, that he brings this action in a court of law.

But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is that by reason of the occasion on which they are made, the making of them is not such a publication as will support an action for libel or slander. On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity or in county-courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence or by members of the Legislature in either House of Parliament, or by members of the Crown in advising the sovereign, is absolutely privileged, and cannot be inquired into in an action at law for defamation. The case of *Home* v. *Bentinck*[1] when carefully considered, although decided upon a bill of exceptions to the rejection of evidence, is really an authority that the present action cannot be

[1] 2 B. & B. 130.

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maintained; and, being a decision of the Exchequer Chamber, may be taken to have settled the law upon this important subject.

In that case, as in this, a court of inquiry had been held, touching the conduct of the plaintiff, convened by the Duke of York, then commander-in-chief, and a report had been made and delivered personally by the president to his Royal Highness; and the action was brought by the plaintiff against the president; the declaration charging the report as a libel. The minutes, consisting of the evidence and the report, were produced at the trial by the military secretary of the commander-in-chief, and it was objected that these minutes ought not to be admitted, and could not be read in evidence on behalf of the plaintiff. Abbott, C. J., held the evidence inadmissible, and it was rejected accordingly. The plaintiff then offered, as secondary evidence, a copy of the minutes; but this was also held inadmissible, and rejected by the Lord Chief Justice. Upon a bill of exceptions to the rejection of this evidence, the case came before the Exchequer Chamber, and was very elaborately argued, and all the authorities bearing upon the points in question were brought before the Court by the late Mr. Joshua Evans. The Court, however, disallowed the exception, and their judgement clearly shows that the entire proceeding before a court of inquiry is privileged, and cannot be produced, or read in evidence upon any trial at law. The court of inquiry was held to be 'an official proceeding directed by the commander-in-chief, for the purpose of obtaining information which he was bound to obtain, as to the conduct of an officer holding a commission in the army, and in furtherance of the exercise of his public duty,' whatever it might be upon the result of such inquiry. The duty of the then defendant, as the presiding officer, was held to be imperative upon him, and the report which he had made an act of duty imposed upon him as a military man by his superior officer, the commander-in-chief, whose order he was bound to obey. It is impossible to deny that it was equally a duty imposed upon the defendant in the present case to attend as a witness, and to give evidence upon the court of inquiry, as called upon to do by the president himself, acting under the orders of the commander-in-chief, and which orders the president and the defendant were alike bound by their duty to the sovereign to obey. And it was observed by Dallas, C. J., in delivering the judgement of the Court in *Home* v. *Bentinck*[1], that it was impossible

[1] 2 B. & B. at pp. 161–164.

not to see that the plaintiff in that case, when he became an officer in the army, in point of fact voluntarily subjected himself to that court of inquiry to which he must have known that officers in other instances had been made amenable. After remarking that the evidence had been returned and deposited with the commander-in-chief, the Chief Justice proceeds: 'The question then is, whether,—I will not say Sir Henry Torrens would have been compelled to produce the result of this inquiry,—but whether if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not a privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence.' And, further: 'This is an inquiry to be made by the commander-in-chief with a view to ascertain what the conduct of the party suspected might have been; in the course of which a number of persons may be called before the Court, and may give information as witnesses which they would not choose to have disclosed; but if the minutes of the court of inquiry are to be produced in this way on an action brought by the party, they reveal the name of every witness, and the evidence given by each. . . . It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and therefore, independently of the character of the Court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate inquiry and the names of persons, stand protected.' And, finally: 'It seems therefore to us, upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench was perfectly right in not suffering these minutes to be brought forward at the trial.' Surely this case—the decision of a court of error—is a conclusive authority that a court of inquiry is a tribunal authorized, recognized and sanctioned by law, and that the proceedings and the minutes of the proceedings of such a court are privileged against publication, and are inadmissible in evidence upon the trial of an action like this. We cannot doubt, therefore, that if the attention of the judge who tried the cause had been called to this decision, although the parties had admitted

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the evidence in question, as given before the court of inquiry, he would have felt it, to use the language of Chief Justice Dallas, 'his bounden duty to have interposed and prevented the admission of such evidence.' If, then, in the present case, the evidence of the proceedings before the court of inquiry was inadmissible by law, and ought never to have been permitted to have been produced in court, how is it possible that this action can be maintained?

But there is another and a higher ground upon which we are of opinion that the defendant is entitled to the judgement of the Court. The whole question involved in this cause is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a court of law. The attendance of the defendant as a witness, the duty to give evidence when called upon, the validity of the order to hold a court of inquiry, the effect of the evidence upon the military character and upon the military rights and liabilities of the plaintiff, and indeed of the defendant likewise, are purely questions of a military nature. The evidence itself was given by the defendant, a military officer in his military capacity upon a military subject, at the command of his military superior, and concerning the military conduct of another military officer. It may well be that the truth or falsity of the evidence given is also a military question, although apparently in terms a question of fact; and that which the plaintiff might allege, and a court of law or a jury might hold, to be false, a military tribunal might hold, and rightly hold, to be true; as if the defendant had deposed that he had given an order to the plaintiff which it was his duty to have obeyed, but which he had disobeyed. The order might have been to seize a battery, and the plaintiff might have alleged that he had done all that could be done, and that it was impracticable, and that the defendant knew that it was so; and a jury might find all this to be true. But an assembly of military officers might hold, and justly and truly, that the order might, and could, and ought to have been obeyed. With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton* v. *Johnstone*[1], and the cases *In re Mansergh*[2] and *Grant* v. *Gould*[3], *Barwis* v. *Keppel*[4], *Keighly* v. *Bell*[5], *Dawkins* v. *Lord Rokeby*[6], and *Dawkins* v.

[1] 1 T. R. 493. [2] 1 B. & S. 400; 30 L. J. (Q. B.) 296.
[3] 2 H. Bl. 69. [4] 2 Wils. 314. [5] 4 F. & F. 763. [6] 4 F. & F. 806.

Lord F. Paulet[1] are all authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law.

On the other hand, the case for the plaintiff, when attentively considered, is really destitute of all authority to support the action. No one decision is to be found that an action for libel or slander is maintainable upon evidence given before any tribunal constituted, sanctioned, or recognized by or according to law. There is, indeed, in the eloquent and powerful reasoning of Lord Chief Justice Cockburn in *Dawkins* v. *Lord F. Paulet*[1], much which is opposed to the view we take of the incompetence of a court of law to deal with purely military questions arising before a military tribunal. But the opinion thus delivered, though resting upon high authority, is no decision upon the question before us, or upon any cognate question. And it is satisfactory to us to feel that the general question of privilege, as applied to communications between military authorities upon military subjects, and whether before a military tribunal or otherwise, though governed, and, as we think, for the present decided, by the decisions referred to in the Exchequer Chamber, is yet open to final consideration before a court of the last resort.

It remains to us only to consider two cases upon which the plaintiff has relied as authorities in his favour. And, first, *Warden* v. *Bailey*[2], which, however, merely shows that the adjutant of a regiment of militia has no authority to order a private to attend a school and pay eightpence a month for instruction, and that trespass lies for causing him to be imprisoned in a common jail for disobedience to such an order. This was not an act done which, though in excess, was in the exercise of military authority or in the discharge of military duty, but was simply a wrongful and illegal act, without any colour of law, as if an officer had ordered a soldier to be imprisoned in a debtor's prison for non-payment of an alleged debt. *Dickson* v. *Lord Wilton*[3], also relied upon by the counsel for the plaintiff, is distinguishable in this, that the libel there charged was a communication made by the defendant to a higher military authority, not in any proceeding before a military tribunal, or in obedience to the order of a superior officer, but which, though, as he alleged, in the discharge of his duty,

[1] L. R. 5 Q. B. 94. [2] 4 Taunt. 67. [3] 1 F. & F. 419.

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was contended by the plaintiff to have been made, and was in fact made, voluntarily and of his own accord. But were the facts of the two cases identical? We think, with the majority of the judges in *Dawkins* v. *Lord F. Paulet*[1], that the motives, as well as the duty, of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a court of law to determine.

It may also be observed that the case of *Dickson* v. *Lord Wilton*[2] was a mere *nisi prius* decision, and not reviewed upon motion for a new trial; and that the ruling of Lord Campbell, that the communication charged as a libel, though held by the Secretary for War on behalf of the Crown, should be produced from his office and read in evidence, was directly at variance with the judgement of the Exchequer Chamber in *Home* v. *Bentinck*[3]; and the decision that the communication itself was for the consideration of the jury upon the question of malice was inconsistent with the great mass of authorities above referred to.

On these grounds we are all of opinion that the exception in this case should be overruled, and that the defendant is entitled to the judgement of the Court.

Judgement for the defendant.

NOTE.—See *Royal Aquarium, &c.* v. *Parkinson*, 1892, 1 Q. B. 431.—[ED.]

1891. STUART *v.* BELL, L. R. 1891, 2 Q. B. 341 (C. A.).

A statement is privileged, if made bonâ fide in the discharge of a moral or social duty, or on the ground of an interest in the party making it, with a corresponding interest in the party receiving it. This qualified privilege may be rebutted by evidence of actual malice.

1891. STUART v. BELL.

LINDLEY, L. J.—This is an action for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr. Stanley. Mr. Stanley was the guest of the defendant, who was the Mayor of Newcastle. The plaintiff was staying with his master at the Mansion House at Newcastle. They had come from Edinburgh, and were going on further visits. Whilst Stanley and the plaintiff were still at the Mansion House, at Newcastle, the chief constable of that town received from the chief constable of

[1] L. R. 5 Q. B. 94. [2] 1 F. & F. 419. [3] 2 B. & B. 130.

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Edinburgh a letter to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The chief constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated. This communication, which is the slander complained of, was made to Stanley just before he and the plaintiff left Newcastle; they were, in fact, just about to leave. Two or three days afterwards Stanley told the plaintiff what had been communicated to him, and discharged the plaintiff on the ground that he could not keep in his employ a person on whom any suspicion of dishonesty had fallen. This discharge, and the inability of the plaintiff to obtain a fresh situation, have occasioned loss to the plaintiff, and this loss is the special damage which he has sustained by reason of the slander complained of. The learned judge who tried the case told the jury that the communication made by the defendant to Stanley was not privileged, and the jury found a verdict for the plaintiff, damages £250. The application to us is for a new trial, or that judgement may be given for the defendant, on the ground that the communication was privileged, and that there was no evidence to go to the jury of malice on the part of the defendant.

To determine this matter it is necessary to consider—first, whether the judge was right in telling the jury that the communication was not privileged; and, secondly, if the judge was wrong in this respect, whether there was or was not evidence of malice proper to be left to the jury, which would justify their verdict.

In order to answer the first question it is necessary to consider what is meant by a privileged communication. A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language. This is the effect, in a few words, of the leading cases on the subject—namely, *Toogood* v. *Spyring*[1]; *Wright* v. *Woodgate*[2]; *Coxhead* v. *Richards*[3]; *Whiteley* v. *Adams*[4]; and *Clark* v. *Molyneux*[5]. It is the duty of the judge

[1] 1 C. M. & R. 181.
[2] 2 C. M. & R. 573.
[3] 2 C. B. 569.
[4] 15 C. B. (N. S.) 392, 418.
[5] L. R. 3 Q. B. D. 237.

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to determine whether an occasion is privileged or not, and if it is, and if there is no evidence of malice to go to the jury, it is his duty to enter judgement for the defendant: see *Whiteley* v. *Adams*[1]; *Clark* v. *Molyneux*[2]. On the other hand, if the occasion is not privileged, or if there is any evidence of malice (the meaning of which I will examine presently), then the case must be left to the jury. The law on this point has long been well settled, and was carefully explained in *Clark* v. *Molyneux*[3].

What, then, are privileged occasions—what are the circumstances which must exist in order to rebut the implication of malice which arises from the utterance of untrue defamatory language? Without referring to such matters as reports of what occurs in Parliament, courts of justice, or public meetings, which have no bearing on the present case, I can find no better answer to this question than that given by Parke, B., in *Toogood* v. *Spyring*[4], and by Erle, C. J., in *Whiteley* v. *Adams*[1]. In *Toogood* v. *Spyring*[4], Parke, B., in speaking of the publication of statements false in fact and injurious to the character of another, said (p. 193): 'The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.' This passage has been frequently quoted, and always with approval.

The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not. *Coxhead* v. *Richards*[5], in which four very eminent judges were equally divided upon the question whether an occasion was privileged or not, is a striking illustration of the truth of this remark. In that case the mate of a ship wrote to the defendant, a friend of his,

[1] 15 C. B. (N. S.) 392, 418. [2] L. R. 3 Q. B. D. 246.
[3] L. R. 3 Q. B. D. 237. [4] 1 C. M. & R. 181. [5] 2 C. B. 569.

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a letter reflecting on the character of the captain. The defendant, who was a stranger to the owner of the ship, showed the letter to the owner; the owner dismissed the captain, who sued the defendant for libel. Tindal, C. J., and Erle, J., held the occasion privileged. Coltman and Cresswell, JJ., held that it was not. In *Amann* v. *Damm* [1], the late Willes, J., said he was fully prepared to go the whole length of the doctrine laid down by Tindal, C. J., and Erle, J., in *Coxhead* v. *Richards* [2]. Lord Blackburn also approved of it in *Davies* v. *Snead* [3]. Having carefully considered all the four judgements in that celebrated case (*Coxhead* v. *Richards* [2]), I have no hesitation in saying that the judgement of Tindal, C. J., is the one which carries conviction to my own mind, and is the one which I consider the most accurate and safe to take as a guide; nor am I aware of any subsequent case in which that judgement has been disapproved.

In *Whiteley* v. *Adams* [4], Erle, C. J., alludes to the difficulty of deciding questions of moral duty to which I am now addressing myself. It was an action for libel on two letters. On page 414 he said, 'Each of these letters contains matter which is clearly defamatory of the plaintiff, and forms the foundation of an action, unless the circumstances under which it is written bring it within the protection afforded by the law to what are called privileged communications. I take it to be clear that the foundation for an action for defamation is malice. But defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails. In the present case the jury found that the letters were written by the defendant bonâ fide and in the honest belief that what he wrote was true, and that it was his duty to make the communications he did. Do the

[1] 8 C. B. (N.S.) 597.
[2] 2 C. B. 569.
[3] L. R. 5 Q. B. 608, 611.
[4] 15 C. B. (N.S.) 418.

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circumstances show that the letters were written in the discharge of some social or moral duty, or that the writer or the person to whom they were addressed had an interest in making or receiving the communications?' Then he says that in that particular case he felt bound to answer that question in the affirmative. On page 418 there is another passage which appears to me important. He says: 'Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification; but all are clear that it is a question for the judge to decide, and I am clear that the letters in question, seeing the circumstances under which they were written, do not show what in law amounts to malice.' Then he goes on to say that 'the rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth.' Then he goes on to make further observations, which I need not read.

Now, adopting the language of Erle, C. J., I ask, Do the circumstances show that the statement complained of was made in the discharge of some social or moral duty, or that the speaker or the person addressed had an interest in making or receiving the communication? That Stanley had an interest in the character of his servant and in receiving the communication made to him can hardly be denied. His interest in the matter is too obvious to require comment. If I understand rightly the judgement I have just read, Stanley's interest in receiving the communication made to him is alone sufficient to render the occasion of making the communication a privileged occasion. But this would be going further than is warranted by the language of Mr. Baron Parke in *Toogood* v. *Spyring*[1]; it would not, therefore, be satisfactory to pass over the other matters indicated as important for consideration—I mean the defendant's interest in making the communication and his duty to make it. Considering that Stanley and the plaintiff were just

[1] 1 C. M. & R. 181.

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about to leave Newcastle when the defendant spoke to Stanley, I am not prepared to base my judgement on the ground that the defendant made the communication complained of in the conduct of his own affairs or in a matter in which his interest was concerned. I am not clear that the defendant had an interest as distinguished from a moral or social duty to act as he did.

But the question still remains whether the defendant was not under a moral or social duty to make such communication. Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief. As Chief Justice Tindal said in *Coxhead* v. *Richards*[1], if the defendant took a course not justifiable in a court of law, he, and not the plaintiff, must suffer for the error. In *Waller* v. *Loch*[2], the Master of the Rolls (Sir George Jessel) is reported to have said that if the defendant bonâ fide thought that he was discharging a moral or social duty he would be protected, but in so saying the learned judge was not distinguishing a privileged occasion from malice, and his observation, if intended to apply to privileged occasions, is not in conformity with other authorities. Some passages in the judgements in *Pattison* v. *Jones*[3], which were relied upon in support of the view of the Master of the Rolls (Sir George Jessel), obviously had reference to malice, and not to privileged occasion. Upon the point I am now considering, the headnote in *Whiteley* v. *Adams*[4] goes too far, and further than the judgements themselves warrant. The duty was affirmed by the Court, and did not rest on the defendant's belief, although his belief showed that there was no malice.

The question of privileged occasion turning then on the question of moral or social duty and being a question of law for the judge and not a question for the jury, it is necessary to consider the grounds on which such duty can be maintained. The grounds in this case are the relation in which the defendant stood to Stanley and the relation in which the defendant stood to the public. His relation to Stanley was that of host to guest, and, to some extent,

[1] 2 C. B. 569, 595.
[2] L. R. 7 Q. B. D. 619.
[3] 8 B. & C. 578.
[4] 15 C. B. (N. S.) 418.

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of friend to friend. His relation to the public was that of mayor and magistrate in Newcastle, where Stanley was when the communication was made. The defendant knew that Stanley was about to be entertained by other people at other places, and that the plaintiff would accompany him. Under these circumstances, I am clearly of opinion that it was the defendant's moral or social, though not legal, duty to communicate to Stanley the information which the defendant had received. That information was no vague rumour or idle gossip, but came officially from the chief constable of Edinburgh to the chief constable of Newcastle, and was sent by him to the defendant, who was, as I have said, mayor of Newcastle and the host of Stanley. Suppose the suspicion which had fallen on the plaintiff had been well-founded and not ill-founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer no; he would not have been acting up to his duty either to the public or to Stanley. Suppose the plaintiff had proved dishonest at the next place he visited, would the defendant then have been free from moral blame if he had not communicated to Stanley what he had learned from the police? In my opinion the defendant would then have been greatly to blame if he had held his tongue. The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff. My own opinion is clear and strong that it was his moral or social, although not his legal, duty to do so; in other words, the occasion was privileged, and the judge should have directed the jury to this effect. It follows that there ought to be a new trial unless there was no evidence of malice on which a jury could properly find a verdict for the defendant.

I pass, therefore, to the consideration of the question of malice. If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him, as was settled in *Clark* v.

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Molyneux [1]. Malice, in fact, is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L. J., every wrong feeling in a man's mind (*Clark* v. *Molyneux* [2]). There is no question here of the belief by the defendant in the truth of what he said. He did not say or intimate that the plaintiff had stolen a watch—he merely stated that the Edinburgh police suspected the plaintiff of having done so, which was true enough. This case illustrates the truth of the remark made by Lord Bramwell in *Clark* v. *Molyneux* [3]. He said, 'A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character as on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander?' What, therefore, has to be ascertained is whether the defendant acted bonâ fide in the discharge of that moral duty which he owed to Stanley or whether he acted from some other unjustifiable motive —from some motive other than a sense of duty. As Lord Bramwell said in *Clark* v. *Molyneux* [4], 'If the defendant was actuated by some motive other than that which would alone excuse him the jury may find for the plaintiff.'

The evidence on this head is contained in the examination and cross-examination of the only two persons present when the defamatory matter was uttered—namely, the defendant and Stanley. I have read their evidence with care, and I can find nothing to support a charge of malice against the defendant. On the contrary, the evidence disproves malice, and shows affirmatively that the defendant acted bonâ fide in the discharge of what he believed to be his duty, and of what was his duty, and did not exceed (either in what he said or in any other way) what a reasonably careful man would have said or done under similar circumstances. It was contended that the defendant did not show Stanley the letter written by the Edinburgh police and did not urge on Stanley the necessity for caution so carefully as the Edinburgh police urged caution in their letter to the Newcastle police. But even if the defendant was less cautious than he himself says he was, this would be too slight

[1] L. R. 3 Q. B. D. 237.
[2] L. R. 3 Q. B. D. 247.
[3] L. R. 3 Q. B. D. 244.
[4] L. R. 3 Q. B. D. 245.

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a matter to warrant a finding of malice against the defendant; and there is positively nothing else on which to found such a charge. The defendant knew nothing of the plaintiff, and could have had no motive whatever for injuring him. The inspector who brought the letter to the defendant suggested to him the propriety of speaking to Stanley on the subject. The defendant took Stanley aside and communicated to him in private the fact that the Edinburgh police had written a letter to the Newcastle police to the effect that the plaintiff was suspected of having stolen a watch when at the Waterloo Hotel in Edinburgh. This was really all that the defendant did. The conclusions, then, at which I have arrived are that the occasion was privileged and that there was no evidence of malice. The judge, therefore, ought to have withdrawn the case from the jury and ought to have given judgement for the defendant. There is no question proper to be left to a jury; there are no grounds for a new trial, the verdict and judgement which have been entered for the plaintiff ought, in my opinion, to be set aside, and judgement ought to be entered for the defendant, with costs here and below. The result may seem hard on the plaintiff, who has unquestionably been injured. It was his misfortune to fall under suspicion, and to be dismissed by his master without inquiry. But this is no reason for holding the defendant responsible for this misfortune, and he cannot be so held without limiting privileged occasions to such an extent as to render the law applicable to them opposed to the general interests of society instead of being in harmony with them, nor without violating the important doctrine which has frequently been asserted by judges of the highest eminence—I mean the doctrine that the law has not restricted the right to make such communications within any narrow limits.

KAY, L. J., delivered a judgement concurring with that of LINDLEY, L. J. LOPES, L. J., did not dissent from the law as laid down by them, but took a different view of the facts.

1894. HEBDITCH *v.* MACILWAINE, L. R. 1894. 2 Q. B. 54.

Where one who honestly believes that a wrong has been done, makes a complaint of such wrong, his complaint, even although it contains defamatory matter, is privileged, if made to any person or body having jurisdiction over the subject-matter of the communication. *Aliter non.*

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HERDITCH v. MACILWAINE.

LORD ESHER, M.R.—In this case the plaintiff has brought an action against the defendants for writing and publishing a libel upon him, the defamatory matter complained of being that he had, when a candidate for the office of guardian of the poor, been guilty of treating. It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter which the jury found to be libellous with regard to the plaintiff, and which was untrue. The defendants set up by way of defence that the occasion was privileged. It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion.

What are the facts upon which the question, whether the occasion was privileged, depends in the present case? There had been an election to the office of guardian of the poor, and the plaintiff had been elected. The defendants were ratepayers, who had a right to vote at the election. After the election they wrote and sent the letter containing the matter complained of to the board of guardians. It seems clear that, when that board had received the letter, they could do nothing in the matter. They could not set aside the election. Such being the facts of the case, what was the judge called upon to consider in dealing with the question whether the occasion was privileged? He had first to consider whether the defendants, who published the defamatory matter, had any interest or duty in connexion with the subject which they thus brought before the board of guardians. I am not prepared to say that they had not an interest or duty. On the contrary, I am inclined to think that they had an interest in the matter. They were electors, and had an interest in having the office filled by a person properly elected. Then the position of the board of guardians, to whom the defamatory matter was

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published, had to be considered. They had no interest in the matter, as it seems to me, and, as I have already said, they had no duty or power to take any action upon the communication made to them. Under these circumstances I think it clear that the occasion was not privileged.

It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter, which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to show that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged. Reliance was placed rather on authority than on principle in support of the contention for the defendants. If that contention had been decided to be correct by the Court of Appeal or any court whose authority was binding on us, there would, of course, be no more to be said. But I do not think that the point has been decided in favour of the defendants by any such court. . .

Therefore, in the present case, when it was proved to the judge that the libel was published by the defendants to the board of guardians, who had no interest in the matter nor any duty or power to deal with it, then, without more, he ought to have held that the occasion was not privileged, and there was no further question to try as to privilege. Therefore I think that the questions which he left to the jury with regard to the question of privilege were unnecessary and irrelevant, and consequently it is immaterial to consider whether they were right in form or not, or what the

effect of the findings of the jury upon them may be. I am of opinion that on the undisputed facts the judge was bound to rule that the occasion was not privileged. For these reasons I think that this application must be dismissed. 1894. HEBDITCH v. MACILWAINE. Lord Esher, M. R.

A. L. SMITH and DAVEY, L. JJ., delivered judgement to the same effect.

Application dismissed.

1868. WATKIN *v.* HALL, L. R. 3 Q. B. 396.

A verbal statement is defamatory if it imputes crime, or disparages a man in his trade or profession, or occasions him special damage.

The mere repetition of such a defamatory statement is actionable.

Declaration, that the plaintiff was the chairman and a director of a railway company established by Act of Parliament, to wit, the South-Eastern Railway Company, for reward and salary to the plaintiff in that behalf; and was also the chairman and a director of a certain other railway company established by Act of Parliament, to wit, The Manchester, Sheffield, and Lincolnshire Railway Company, also for reward and salary for him in that behalf; and then was also the chairman and a director of the Grand Trunk of Canada Railway, also for reward and salary to him in that behalf; and was a holder and proprietor of a large quantity of shares of great value, and was otherwise interested in the several companies and the concerns and affairs thereof respectively, and in the welfare and prosperity thereof respectively, and devoted and gave much of his time and attention to the management and business of the several companies respectively and greatly occupied himself therewith, and thereby acquired great gains. And that shortly before the committing of the grievances a fall in the market value of the shares in the South-Eastern Railway Company had occurred and taken place, and the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such chairman and director of the South-Eastern Railway Company, and of and concerning him in his connexion with the company and of his position therein, and of and concerning the fall in the market value of and concerning the shares in the South-Eastern Railway Company, and of and concerning a rumour assumed by the defendant to have existed and been circulated re- 1868 WATKIN v. HALL.

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specting the plaintiff and respecting his pecuniary position and solvency, and of and concerning the premises, the words following, that is to say, 'you have heard what has caused the fall,' (meaning thereby the fall in the market value of the shares in the South-Eastern Railway Company), 'I' (meaning the defendant) 'mean the rumour about the South-Eastern chairman having failed,' (meaning thereby that the plaintiff so being such chairman of the South-Eastern Railway Company and such director of the company had become embarrassed in his pecuniary affairs and had become and was insolvent), alleging special damage.

Plea, that in speaking the words in the declaration mentioned, the defendant meant, and was understood by the bystanders to mean, that there had been and there was a rumour current on the Stock Exchange about the chairman of the South-Eastern Railway Company having failed; and not that the plaintiff had become embarrassed, and had become and was insolvent as in the innuendo in the declaration alleged. And the defendant further says that it was and is true that there had been and then was a rumour current in the Stock Exchange about the chairman of the South-Eastern Railway Company having failed.

Demurrer and joinder.

BLACKBURN, J.—The only questions are, whether or not an action will lie for stating—upon an occasion which does not show the communication to be privileged—that there is a rumour upon the Stock Exchange that the plaintiff, who is a trader, was in insolvent circumstances, and had failed; the defendant stating, not that the plaintiff was insolvent, but that there was a rumour to that effect; and whether it would be a justification to show the rumour did exist, and that the defendant had only repeated it, and stated at the time openly that it was only a rumour. Where disparaging words are spoken of a person, and either actual injury has flowed from them, or they were spoken of him in the way of his trade or profession, in contemplation of law damage has accrued to the person defamed. According to the doctrine which formerly prevailed, one reason why an action would lie for words imputing an indictable offence, was that damage might accrue from the possibility of their utterance influencing the grand jury, who might thereby be induced to find a bill. In modern times such a reason

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would not be allowed. Again, to assert of any man that he then had an infectious disease, or to say of a cattle-dealer that he then had the cattle disease amongst his cows, would be actionable; because in the former instance no one would associate with a person so affected, in the latter, no one would buy cows of the cattle-dealer. The result of these instances is, that where the matter charges crime, or misconduct in a person's trade, or actually produces loss, the law implies malice, and the person uttering the slander must pay damages, on the ground that he has uttered it wantonly; provided the plaintiff can show that there was nothing to disprove the malice implied by law from the mere fact of stating without reason that which is injurious; but if the slanderer's statement be uttered on an occasion which justifies it, unless malice in fact be proved, the legal inference that it exists is rebutted, although the slanderer's statement may have been made without cause. There is no pretence on the record, as it stands now—whatever the evidence may turn out to be—that the slander was uttered under circumstances which justify the repetition of the rumour, upon the ground of the repetition being a privileged communication. Then, does the allegation that the slander was a rumour, which the defendant in fact heard, afford a defence? I do not think better words can be used to express the principle applicable to this point than those of Littledale, J. He says[1], 'It is competent to a defendant, upon the general issue, to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law on grounds of public policy allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially, because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant by showing that he stated, at the time when he published slanderous matter of

[1] *M'Pherson* v. *Daniels*, 10 B. & C. at pp. 272, 273.

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a plaintiff, that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances which the law on grounds of public policy allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person, as well as the defendant.' I adopt those words of Littledale, J., in *M'Pherson* v. *Daniels*[1]; I adopt those words, expressing, as I think they do, in accurate language, the idea in my mind upon the subject. The question is, whether the words repeated by the defendant were likely to be injurious to the plaintiff, and calculated to do him damage, being uttered by the defendant without any reason that would make it not malicious to repeat them. Whether the fact that other people had spread the report does, or does not, entitle the plaintiff to recover substantial damages, or whether one farthing would be sufficient, is a question for the jury to estimate on weighing the actual mischief that the plaintiff may have suffered from the unauthorized repetition of a rumour, which must, in its nature, be mischievous to a person in trade, namely, a rumour that he has failed.

LUSH, J., delivered judgement to the same effect.

Judgement for the plaintiff.

[1] 10 B. & C. at pp. 272, 273.

1869. WREN *v.* WEILD, L. R. 4 Q. B. 730.

An action on the case will lie for a false and malicious statement that the owner of property real or personal has no title to it—provided that actual damage has resulted therefrom.

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BLACKBURN, J.—This was a rule to set aside a nonsuit, against which cause was shown in these sittings before my Brothers Lush and Hayes and myself.

The declaration contained eight counts, to the effect that the plaintiffs made and sold spooling machines, and that the defendant *falsely and maliciously* wrote to persons in treaty with the plaintiffs for such machines that they were infringements of a patent of the defendant, and that if they were used he would claim royalties for their use, and, if not paid, take legal proceedings; in consequence of which the plaintiffs lost the sale of their machines.

There was no allegation that the defendant did this without reasonable and probable cause, nor, except in so far as might be implied from the terms of the defendant's letters (which, however, were averred to be false), did it appear on the face of the declaration that the defendant had any patent, or was other than a gratuitous intermeddler.

The defendant pleaded not guilty, upon which issue was joined.

On the trial before my Brother Lush it was proved that the defendant had a subsisting patent. The specification described a very complicated machine, and claimed the whole as a new combination, and also separately claimed many subordinate parts of the machine as new.

The plaintiffs' machine did not comprise in it anything precisely identical with any of those subordinate parts, but so closely resembled them as, at least, to give plausible grounds for contending that they were equivalent to them.

The plaintiffs, it appeared, were negotiating for the sale of their machines to different manufacturers, some of whom, if not all, were already using the defendant's machine under licences from him. The defendant wrote to them the letters complained of in the declaration. There were then some abortive attempts at arranging the terms of an indemnity to be given by the plaintiffs to their customers; but those going off, the customers refused

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to buy the plaintiffs' machine with the risk of litigation with the defendant.

The plaintiffs then brought the present action.

At the trial the plaintiffs' counsel offered to prove, in addition to the facts above stated, various specifications and machines existing before the date of the defendant's patent, which, according to his contention, would show that the defendant's specification claimed matters that were not new; and also that the defendant had himself used them, and consequently, as it was argued, knew the facts which would render his patent void. My Brother Lush was of opinion that, inasmuch as the patent was still subsisting, and not set aside on *scire facias* or otherwise, this evidence was immaterial.

Mr. Webster, on the argument before us, contended that this evidence would not only have shown that the defendant's patent was void, but would also have shown that the plaintiffs' machines were not an infringement of the patent, inasmuch as, he said, the plaintiffs did not use the whole of anything the defendant claimed; and the evidence would show that the part they used was not new, and therefore not an infringement within the rule laid down in *Sellers* v. *Dickinson*[1].

The evidence was rejected, and my Brother Lush directed a nonsuit.

The most favourable view for the plaintiffs is to consider whether,—if this evidence had been received, and had proved all that it could prove, namely, that the patent of the defendant was void, and that, even if it was good, an action brought on it against those who used the plaintiffs' machine must have failed, and that the defendant, when he wrote the letters, knew the facts which would have produced this effect,—there would have been evidence which the judge ought to have left to the jury in support of the issue in the present action. And we think that there would not have been such evidence, and consequently that the nonsuit should not be set aside.

It becomes, therefore, necessary to consider what would support the issue here joined.

No action precisely like this has ever been brought; but there is a well-known action for slander of title, where an unfounded

[1] 5 Ex. 312; 20 L. J. (Ex.) 417.

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assertion that the owner of real property has not title to it,—if made under such circumstances that the law would imply malice, or if express malice be proved, and special damage is shown, such as, for instance, that a bargain to sell the land is lost,—is held to give a cause of action. And we see no reason why a similar rule should not apply where the false and malicious assertion relates to goods, and the damage arises from the loss of a bargain to sell them; and accordingly, in *Green* v. *Button*[1], it was held, on demurrer, that a declaration which showed that the defendant knew that he had no claim, and that his assertion of claim of right was made falsely and maliciously, and without reasonable and probable cause, and that special damage ensued, was good. The case of *Lovett* v. *Weller*[2], and the first resolution in *Sir G. Gerard* v. *Dickenson*[3], are authorities that, without the allegation of knowledge, or, at least, of want of reasonable and probable cause, the declaration would have been bad. But it is obvious that, where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and, indeed, in common fairness, bound, to give the intended purchaser warning of such his intention: see *Pitt* v. *Donovan*[4]; and, consequently, we think no action can lie for giving such preliminary warning, unless either it can be shown that the threat was made malâ fide, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful.

. . . . . .

If, therefore, the plaintiffs had given evidence, on which the jury might properly find that the defendant made the communication to the intended purchasers malâ fide, and without any intention to institute legal proceedings at all against the purchasers, so that it was not a step taken in support of his real or fancied right against the purchasers, but entirely out of malice against the plaintiffs; or on which the jury might have properly found that the defendant did not so much as fancy he had a right, but knew certainly that his claim was utterly without ground of truth, we are inclined to think that it would have been proper to leave that evidence to the jury in support of the plaintiffs' allegation that the de-

[1] 2 C. M. & R. 707.
[2] 1 Roll. 409.
[3] 4 Rep. 18 a.
[4] 1 M. & S. 639.

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fendant's letter was false and malicious; the question whether that is enough without an express allegation of knowledge or want of reasonable and proper cause being on the record.

But we think that as soon as it was shown in evidence that the defendant really had a patent right of his own and was asserting it, the occasion privileged the communication, and the plaintiffs were bound to prove such malice as would support the action. As the evidence which they tendered was rejected, they are entitled to a new trial if supposing it to have been received, and to have turned out as favourable as possible to the plaintiffs, it would have made a case proper to have been left to the jury. But we think that, supposing everything had been proved which the evidence tendered could have proved, there would have been no case on which the jury could properly have found for the plaintiffs. The whole reasoning of the judges in *Pater* v. *Baker* [1], seems to be strongly in support of this conclusion. The advisers of the plaintiffs seem to have thought it was enough to maintain this action to show that the defendant could not really have maintained any action, and that if well advised he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained; whereas, as we think, the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a bonâ fide claim in support of a right which, with or without cause, he fancied he had; but a malâ fide and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation.

The rule, therefore, must be discharged.

Rule discharged.

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False and malicious statements concerning a man's goods or business, calculated to produce, and producing, actual damage, are actionable.

Where the Court can see that the words published by the defendant are reasonably likely to produce a diminution of the plaintiff's business, evidence of a general loss of business, as distinct from evidence of the loss of particular known customers, is sufficient to support the action.

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Motion to enter judgement for the defendant, or for a new trial,

[1] 3 C. B. 831.

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by way of appeal from the judgement entered by Mr. Commissioner Bompas, Q.C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of 'Ratcliffe & Sons,' having become entitled to the goodwill of the business upon the death of his father, who, with others, had formerly carried on the business as 'Ratcliffe & Sons'; that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the *County Herald*, circulated in Flintshire and some of the adjoining counties, and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the *County Herald*, certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that 'by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business.' The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published bonâ fide; and that the plaintiff's business suffered injury to the extent of £120 from the publication of that statement. The commissioner, upon those findings, gave judgement for the plaintiff for £120, with costs.

The defendant appealed.

May 26. The following judgement of the Court (LORD ESHER, M.R., BOWEN and FRY, L. JJ.), was read by

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BOWEN, L. J.—This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester Assizes, with the result of a verdict for the plaintiff for £120. Judgement having been entered for the plaintiff for that sum and costs, the defendant appealed to this Court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the *County Herald*, a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term 'special damage,' which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be super-

added to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby* v. *White*[1]. In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression 'special damage,' when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, 'express loss,' 'particular damage': *Cane* v. *Golding*[2]; 'damage in fact,' 'special or particular cause of loss': *Law* v. *Harwood*[3]; *Tasburgh* v. *Day*[4].

The term 'special damage' has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson* v. *Moore*[5]; *Rose* v. *Groves*[6]. In this judgement we shall endeavour to avoid a term which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may

[1] 2 Ld. Raym. 938; 1 Sm. L. C., ninth edition, p. 268, per Holt, C. J.
[2] Sty. 169. [3] Cro. Car. 140. [4] Cro. Jac. 484.
[5] 1 Ld. Raym. 486. [6] 5 M. & G. 613.

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unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson* v. *Moore*[1], in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. 'It is not special damage'—says Pollock, C. B., in *Harrison* v. *Pearce*[2]—'it is general damage resulting from the kind of injury the plaintiff has sustained.' So in *Bluck* v. *Lovering*[3], under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram* v. *Lawson*[4]. Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its

[1] 1 Ld Raym. 486.
[2] 32 L. T. (O. S.) 298.
[3] 1 T. L. R. 497.
[4] 6 Bing. N. C. 212.

unauthorized repetition: *Ward* v. *Weeks*[1]; *Holwood* v. *Hopkins*[2]; *Dixon* v. *Smith*[3]. General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable *per se* general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. *Evans* v. *Harries*[4] was a slander uttered in such a manner. It consisted of words reflecting on an innkeeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn—a floating and transitory class. The Court held that general evidence of the decline of business was rightly receivable. 'How,' asked Martin, B., 'is a public-house keeper, whose only customers are persons passing by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?' *Macloughlin* v. *Welsh*[5] was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shown. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see *Ashley* v. *Harrison*[6]. From libels and slanders actionable *per se*, we pass to the case of slanders not actionable *per se*, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Law* v. *Harwood*[7]. Many such instances are collected in the judgements

[1] 7 Bing. 211.
[2] Cro. Eliz. 787.
[3] 5 H. & N. 450.
[4] 1 H. & N. 251.
[5] 10 Ir. L. R. 19.
[6] 1 Esp. 50.
[7] Cro. Car. 140.

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in *Iveson* v. *Moore*[1], where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said—in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim—'damages in the *per quod*, where the *per quod* is the gist of the action, should be shown certainly and specially.' But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. *Hartley* v. *Herring*[2] is probably a case of the kind, although it does not appear from the report under what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: *Dixon* v. *Smith*[3]; *Hopwood* v. *Thorn*[4]. The broad doctrine is stated in Buller's *Nisi Prius*, p. 7, that where words are not actionable, and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: *Malachy* v. *Soper*[5]. The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Lowe* v. *Harewood*[6]; *Cane* v. *Golding*[7]; *Tasburgh* v. *Day*[8]; *Evans* v. *Harlow*[9]. But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: *Janson* v. *Stuart*[10]; *Lord Arlington* v. *Merricke*[11]; *Grey* v. *Friar*[12]; *Westwood* v. *Cowne*[13]; *Iveson* v. *Moore*[1]. In all

[1] 1 Ld. Raym. 486. [2] 8 T. R. 130. [3] 5 H. & N. 450.
[4] 19 L. J. (C. P.) 95. [5] 3 Bing. N. C. 382. [6] W. Jones, 196.
[7] Sty. 176. [8] Cro. Jac. 484. [9] 5 Q. B. 624. [10] 1 T. R. 754.
[11] 2 Saund. 412, n. 4. [12] 15 Q. B. 909 (see Co. Litt. 303 d).
[13] 1 Stark. 172.

actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave* v. *Le Breton* [1], decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, 'easily' answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgement itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave* v. *Le Breton* [1] it was a falsehood openly promulgated at an auction. In the case before

[1] 4 Burr. 2422.

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us to-day, it is a falsehood openly disseminated through the press—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed. It may be added that, so far as the decision in *Riding* v. *Smith* [1] can be justified, it must be justified on the ground that the Court (rightly or wrongly) believed the circumstances under which the falsehood was uttered to have brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs.

Appeal dismissed.

[1] 1 Ex. D. 91.

DECEIT.

1889. DERRY *v.* PEEK, L. R. 14 A. C. 337.

In order to sustain an action for deceit there must be proof of actual fraud, and this *may* be inferred when a false representation is made (1) knowingly or (2) without belief in its truth or without care whether it be true or false.

A false statement honestly believed in is not fraudulent merely because it is made carelessly or upon insufficient grounds (*Angus* v. *Clifford* (1891), 2 Ch. 449).

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DERRY *v.* PEEK.

APPEAL from a decision of the Court of Appeal. The facts are set out at length in the report of the decisions below[1]. For the present report the following summary will suffice :—

By a special Act (45 & 46 Vict. c. 159) the Plymouth, Devonport and District Tramways Company was authorized to make certain tramways.

By s. 35 the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By s. 34 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), which section was incorporated in the special Act, 'all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only.'

In February, 1883, the appellants as directors of the company issued a prospectus containing the following paragraph :—

'One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses.'

Soon after the issue of the prospectus the respondent, relying, as

[1] 37 Ch. D. 541.

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he alleged, upon the representations in this paragraph and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up, and the respondent in 1885 brought an action of deceit against the appellants claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

At the trial before Stirling, J., the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgements of noble and learned lords.

Stirling, J., dismissed the action; but that decision was reversed by the Court of Appeal (Cotton, L. J., Sir J. Hannen, and Lopes, L. J.) who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares, and ordered an inquiry [1]. Against this decision the defendants appealed.

LORD HERSCHELL.—My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

'This action is one which is commonly called an action of deceit, a mere common law action.' This is the description of it given by Cotton, L. J., in delivering judgement. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast

[1] 37 Ch. D. 541, 591.

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liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

. . . . . .

I need go no further back than the leading case of *Pasley* v. *Freeman*[1]. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well settled but that a distinguished judge, Grose, J., differing from his brethren on the bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in 3 Bulstrode 95, who said: 'Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies.' In reviewing the case of *Crosse* v. *Gardner*[2] he says: 'Knowledge of the falsehood of the thing asserted is fraud and deceit;' and further, after pointing out that in *Risney* v. *Selby*[3] the judgement proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: 'The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, *and that the defendant knew it to be so*,' the latter words being specially emphasized. Kenyon, C. J., said: 'The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that this is injurious to the plaintiffs?' In this case it was evidently considered that fraud was the basis of

[1] 2 Smith's L. C. 74. [2] Carth. 90.
[3] 1 Salk. 211.

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the action, and that such fraud might consist in making a statement known to be false.

Haycraft v. *Creasy*[1] was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were, 'I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety.' All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved, because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defence.

I may pass now to *Foster* v. *Charles*[2]. It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the Court, Tindal, C. J., saying: 'It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad.' This is the first of the cases in which I have met with the expression 'fraud in law.' It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word 'fraud' perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterized as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to

[1] 2 East, 92. [2] 7 Bing. 105.

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tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. *Charles*[1] was followed in *Corbett* v. *Brown*[2], and shortly afterwards in *Polhill* v. *Walter*[3]. The learned counsel for the respondent placed great reliance on this case, because although the jury had negatived the existence of fraud in fact the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was, that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says, 'It was contended that . . . in order to maintain this species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be in the legal sense of the word *a fraud*, and for this position was cited *Foster* v. *Charles*[1], to which may be added the recent case of *Corbett* v. *Brown*[2]. The principle of these cases appears to us to be well founded, and to apply to the present.'

In a later case of *Crawshay* v. *Thompson*[4] Maule, J., explains *Polhill* v. *Walter*[3] thus: 'If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill* v. *Walter*[3].' In the same case, Cresswell, J., defines 'fraud in law,' in terms which have been often quoted. 'The cases,' he says, 'may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another.'

In *Moens* v. *Heyworth*[5], which was decided in the same year as *Crawshay* v. *Thompson*[4], Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to

[1] 7 Bing. 105. [2] 8 Bing. 33.
[3] 3 B. & Ad. 114. [4] 4 M. & Gr. 357.
[5] 10 M. & W. at p. 157.

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be imputed, Parke, B., said: 'To support that count (viz., a count for fraudulent representation) it was essential to prove that the defendants *knowingly*' (and I observe that this word is emphasized), 'by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue.'

The next case in the series, *Taylor* v. *Ashton*[1], is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient to render the defendants liable; Parke, B., however, in delivering the opinion of the Court said: 'It is insisted that even that (viz., the gross negligence which the jury had found), accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be *fraudulently made*. . . . But then it was said that in order to constitute that fraud, it was not necessary to show that the defendants *knew* the fact they stated to be untrue, that it was enough that the fact *was* untrue if they communicated that fact for a deceitful purpose, and to that proposition the Court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud.'

Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in

[1] 11 M. & W. 401.

making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Collins* v. *Evans*[1] they were reviewed by the Exchequer Chamber. The judgement of the Court was delivered by Tindal, C. J. After stating the question at issue to be 'whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action,' he proceeds to say: 'The current of the authorities, from *Pasley* v. *Freeman*[2] downwards, has laid down the general rule of law to be, that fraud must concur with the false statement in order to give a ground of action.' Is it not clear that the Court considered that fraud was absent if the statement was 'made honestly, and in the full belief that it was true'?

In *Evans* v. *Edmonds*[3] Maule, J., expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: 'If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representation may still have been fraudulently made.' The foundation of this proposition manifestly is, that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of*

[1] 5 Q. B. 804, 820. [2] 2 Smith's L. C. 74. [3] 13 C. B. 777.

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Scotland v. *Addie*[1] the Lord President told the jury 'that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit.' Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said: 'I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a bonâ fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit.'

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley* v. *Freeman*[2] down to that with which I am now dealing. Even when the expression 'fraud

[1] L. R. 1 H. L., Sc. 145, 162.

[2] 2 Smith's L. C. 74.

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in law' has been employed, there has always been present, and regarded as an essential element, that the deception was wilful either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: 'I confess that my opinion was that in what his lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bonâ fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true.'

Sir James Hannen, in his judgement below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words 'the opinion which they had formed' as meaning anything different from 'the belief which they entertained.'

The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think they bear any such construction. In the case of *Reese Silver Mining Co.* v. *Smith*[1] he said: 'If persons

[1] L. R. 4 H. L. 64, 79.

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take upon themselves to make assertions as to which they are ignorant whether they are true or untrue they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue.' This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For if not it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule, J., in *Evans* v. *Edmonds* [1]. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

In *Peek* v. *Gurney* [2] the same learned lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to show that they were labouring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: 'They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind all that your lordships have to examine is the question, Was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motive may have been, your lordships will be obliged to arrive at the consequences which properly would result from what was done.' In the case then under consideration it was clear that if there had been a false statement of fact it had been knowingly made. Lord Cairns certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial: that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirmation of the law laid

[1] 13 C. B. 777.

[2] L. R. 6 H. L. 377, 409.

down in *Foster* v. *Charles*[1], *Polhill* v. *Walter*[2], and other cases I have already referred to.

I come now to very recent cases. In *Weir* v. *Bell*[3] Lord Bramwell vigorously criticized the expression 'legal fraud,' and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case Cotton, L. J., stated the law in much the same way as he did in the present case, treating 'recklessly' as equivalent to 'without any reasonable ground for believing' the statements made. But the same learned judge in *Arkwright* v. *Newbold*[4] laid down the law somewhat differently, for he said: 'In an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true.' And his exposition of the law was substantially the same in *Edgington* v. *Fitzmaurice*[5]. In this latter case Bowen, L. J., defined what the plaintiff must prove in addition to the falsity of the statement, as 'secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false.'

It only remains to notice the case of *Smith* v. *Chadwick*[6]. The late Master of the Rolls there said, 'A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud.' This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who

[1] 7 Bing. 105.
[2] 3 B. & Ad. 114.
[3] 3 Ex. D. 238.
[4] 17 Ch. D. 301.
[5] 29 Ch. D. 459.
[6] 20 Ch. D. 27, 44, 67.

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makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir George Jessel in *Smith* v. *Chadwick*[1] to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: 'On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit.'

I may further note that in the same case, Lindley, L. J., said: 'The plaintiff has to prove, first, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or at all events that they did not believe the truth of it.' This appears to be a different statement of the law to that which I have just criticized, and one much more in accord with the prior decisions.

The case of *Smith* v. *Chadwick* was carried to your lordships' House[2]. Lord Selborne thus laid down the law: 'I conceive that in an action of deceit it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract.' It will be noticed that the noble and learned lord regards the proof of actual fraud as essential, all the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that although he nearly agreed with the Master of the Rolls, that learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his

[1] 20 Ch. D. 27, 44, 67.

[2] 9 App. Cas. 187, 190.

judgement in this case, or in that of *Brownlie* v. *Campbell*[1] without seeing that in his opinion proof of actual fraud or of a wilful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman*[2] down to *Western Bank of Scotland* v. *Addie*[3] in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir* v. *Bell*[4], where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The dictum of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further.

[1] 5 App. Cas. 925.
[2] 2 Smith's L. C. 74.
[3] L. R. 1 H. L., Sc. 145.
[4] 3 Ex. D. 238.

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But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton* [1] appears to me to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on *Torts* (p. 243, note), referring, I presume, to the dicta of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor* v. *Ashton* [1] is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell* [2], a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that

[1] 11 M. & W. 401. [2] 5 App. Cas. at p. 952.

honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false. 1889.

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I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

. . . . . .

LORD HERSCHELL then dealt with the facts of the case and proceeded:

Adopting the language of Jessel, M. R., in *Smith* v. *Chadwick* [1], I conclude by saying that on the whole I have come to the conclusion that the statement, 'though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit.'

I think the judgement of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed; order of Stirling, J., restored; the respondent to pay to the appellants their costs below and in this House: cause remitted to the Chancery Division.

NOTE.—The student should notice that the right to bring an action for deceit does not depend upon the existence of contractual relations between

[1] 20 Ch. D. at p. 67.

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the parties, although this was thought to be the case before the decision in *Pasley* v. *Freeman* (1789): 3 T.R. 51; 2 Sm. L.C. 74. (See the dissenting judgement of Grose, J., in that case.) As a matter of practice it usually happens that the object of a deceit is to induce some one to enter into a contract, but a right of action equally arises if the deceit induces another to enter upon any course of action to his detriment: see *Pasley* v. *Freeman*, v. s.

The liability of directors and promoters of companies is now regulated by The Directors Liability Act, 1890 (53 & 54 Vict. c. 64).—[ED.]

TRESPASS TO LAND AND DISPOSSESSION.

1829. GREGORY *v.* PIPER, 9 B. & C. 591.

The slightest interference with the land of another, even the placing thereon of a single stone, is technically a trespass. A master is liable in trespass for any trespass committed by his servant which is the inevitable result of his express command.

TRESPASS for casting, throwing, placing, and depositing divers large quantities of earth, stones, bricks, and rubbish against and upon the wall and gates and posts of the plaintiff. Plea, not guilty. At the trial before Alexander, C. B., at the Summer Assizes for the county of Cambridge, 1828, it appeared that the plaintiff occupied a public-house called the 'Rising Sun,' in Newmarket, with a stable-yard belonging to it, where he put up the horses of his guests. The way to the stable was by the back gate from the High Street, through a yard called the Old King's Yard. A wall belonging to the plaintiff separated his stable-yard from the Old King's Yard. The defendant having purchased the property surrounding the Old King's Yard, disputed the plaintiff's right to pass along the same to his stable, and employed one Stubbings, a labourer, to lay down a quantity of rubbish, consisting of bricks, mortar, stones, and dirt, near the plaintiff's stable-yard, in order to obstruct the way; and Stubbings, on April 26, and several following days, laid down rubbish accordingly, part of which rolled against the plaintiff's wall and gates. It lay about two feet high against the plaintiff's wall for five or six yards in length. Stubbings being called as a witness on the part of the plaintiff, stated that he was employed by the defendant to lay the rubbish in the yard; that the defendant had given him orders not to let any of the rubbish touch the plaintiff's wall; that he executed those orders as nearly as he could, and accordingly laid the rubbish at first at the distance of a yard and a half from the wall; and that the rubbish, being of a loose kind, as it became dry naturally shingled down towards and ran against the wall. He added that some of it would of course run against the wall. It further

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appeared that on May 3, when an application was made by the plaintiff to the defendant to remove the rubbish, the latter said he was determined not to remove it. Upon this evidence it was objected by the defendant that trespass was not maintainable, inasmuch as the defendant had given express orders to the servant not to let the rubbish touch the plaintiff's wall; that, therefore, the touching of the wall was occasioned by the negligence of the defendant's servant, and that case, not trespass, was therefore maintainable.

The Lord Chief Baron directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose, Storks Sergt., and Kelly were to have shown cause against the rule, but the Court called upon

Denman and Gunning to support the rule. A master is liable in an action on the case only for the negligent conduct of his servant, and not at all for a wilful unauthorized trespass committed by his servant: *Morley* v. *Gaisford*[1], *M'Manus* v. *Crickett*[2]. And if a servant, being ordered to do a lawful act, exceed his authority, and thereby commit an injury, the master is not liable. Here the master gave express directions to the servant to lay the rubbish so that it should not touch the wall of the plaintiff. [PARKE, J.—The servant could not execute the orders of the master without some of the rubbish touching the wall; that was the necessary consequence of the act ordered to be done, and the person who gave the order must be taken to have contemplated the necessary consequence of his own act. The rolling of the rubbish against the wall was therefore as much the act of the defendant as if he had ordered it to be done.] The master is liable only for the inevitable consequences of the act. Here the servant by extraordinary care might have prevented the rubbish touching the plaintiff's wall. The Society of the Inner Temple have authorized the putting up of boards to obstruct windows opening upon their premises, but so as not to touch the wall of the premises in which the windows are. If a workman had wilfully knocked out a brick, that society would not have been liable. If the workman had done so through negligence they might have been liable in case, but not in trespass.

[1] 2 H. Bl. 442.

[2] 1 East, 106.

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Bayley, J.

BAYLEY, J.—The only question is, Whether the trespass was the act of the master. The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But if in execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass. The evidence shows that that was the natural consequence. The rule must, therefore, be discharged.

LITTLEDALE, J.—Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order which it is difficult for the servant to comply with, and the servant, in execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous uninclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and that the cattle went upon the land of the neighbour, the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary care. If the servant, therefore, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant the master will only be liable in case. Here the servant used ordinary care in the course of executing the master's order, and, notwithstanding that, the rubbish ran against the wall.

PARKE, J.—I think that the defendant is liable in this form of action. If a single stone had been put against the wall it would have been sufficient. Independently of Stubbings's evidence there was sufficient evidence to satisfy the jury that the rubbish was placed there by the defendant, for he expressed his determination not to remove it. It does not rest there. Stubbings says he was desired not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it naturally might run against the wall. Stubbings said that some of it of course would go against the wall. Now the defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the

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plaintiff's wall. If that was so, then the laying the rubbish against the wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser.

Rule discharged.

NOTE.—The distinction between the cases in which a master could be sued in trespass or in case for the acts of his servant is well expressed by Parke, B., in *Sharrod* v. *The London and North-Western Railway Company* (1849), 4 Ex. at p. 585:—

'Now the law is well established on the one hand that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant and be negligent, not wilful, case is the only remedy against the master. The maxim *Qui facit per alium facit per se* renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless as was said by the Court in *Morley* v. *Gaisford*, 2 H. Bl. 442, the act was done *by his command*; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of. The former is the case when one, as servant, is ordered to enter a close to try a right or otherwise; the latter when such a case occurs as *Gregory* v. *Piper*, 9 B. & C. 591, where the rubbish ordered to be removed from a natural necessity fell on the plaintiff's soil; but when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not is not the blow of the master: it is the voluntary act of the servant; nor can it, we think, be reasonably said that all the acts done in the skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass to the same extent as if he had given them himself, because he has impliedly ordered them; but those that were careless and unskilful were not, for he has given no order, except to use skill and care.

'Our opinion is that in all cases where a master gives the direction and control over a carriage or animal or chattel, to another rational agent, the

master is only responsible in an action on the case for want of skill or care of the agent—no more.'—[ED.] 1829.

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32 Car. II. BASELY v. CLARKSON, 3 Lev. 37.

A man is not liable for a trespass committed involuntarily, but he is liable for a trespass committed by mistake.

32 Car. II.

BASELY v. CLARKSON.

Trespass for breaking his close called the Balk and the Hade, and mowing his grass and carrying it away.

The defendant disclaims any title in the land of the plaintiff, but says that he has a Balk and a Hade adjoining to the Balk and Hade of the plaintiff, and that, in mowing his own land, he involuntarily and by mistake mowed some of the grass growing on the Balk and Hade of the plaintiff; intending only to mow the grass growing upon his own Balk and Hade; and that he carried away the grass; which is the trespass complained of; and that before the issue of the writ he tendered to the plaintiff in satisfaction, and that that was sufficient amends.

To which the plaintiff demurred, and judgement was given for the plaintiff; for it appears that the act (of the defendant) was voluntary, and his knowledge and intention are not traversable; they cannot be known.

NOTE.—The plea of tender in this case was apparently based on s. 5 of 21 James I, c. 16, which is as follows:—

'And ... in all accions of trespas *quare clausum fregit* hereafter to be brought, wherein the defendant or defendants shall disclaime in his or their plea to make any title or claime to the land in which the trespasse is by the declaracion supposed to be done and the trespas be by negligence or involuntary, the defendant or defendants shalbe admitted to pleade a disclaymer, and that the trespas was by negligence or involuntary, and a tender or offer of sufficient amends for such trespase before the accion brought: Whereuppon or uppon some of them the plaintiffe or plaintiffes shalbe enforced to joyne issue; and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shalbe nonsuited the plaintiffe or plaintiffes shalbe clearlie barred from the said accion or accions and all other suite concerning the same.'

As this case was decided on demurrer it is hard to see why the defendant's plea was insufficient.—[ED.]

1893. HARRISON *v.* DUKE OF RUTLAND, L. R. 1893, 1 Q. B. 142 (C. A.).

Where a person who has a limited right of entry upon lands exceeds that right he is a trespasser.

The right of the public to use a highway is such a limited right.

1892. HARRISON *v.* DUKE OF RUTLAND.

Motion by the plaintiff in an action for assault for a new trial or to enter judgement for plaintiff on the claim. Cross-motion by the defendants for a new trial or for judgement on certain issues on the claim and on the counterclaim.

The facts are taken from the judgement of Lopes, L. J.— This was an action of trespass to the person brought by the plaintiff against the defendants, claiming damages and an injunction. The defendants, amongst other defences, justified the alleged trespass on the ground that the plaintiff was trespassing upon the soil of the defendant, the Duke of Rutland, for the purpose of interfering with the legal right of shooting belonging to the said duke, which by his friends and keepers duly authorized in that behalf he was then exercising, and alleging the use of no greater force than was necessary for the purpose of abating such trespass. The defendant, the Duke of Rutland, also counterclaimed against the plaintiff in respect of a trespass by the plaintiff to the soil of the said duke, and for his interference with the exercise by the said duke of his legal right of sporting over his said lands, alleging threats to continue and repeat such unlawful interference, and claiming an injunction and damages. Alternatively, the defendants brought into court the sum of 5*s.* in satisfaction of all the causes of action of the plaintiff. The plaintiff joined issue on the defendants' defence and denied the allegations in the counterclaim.

The case came on to be tried before the Lord Chief Justice. So far as material, the facts may be stated as follows: At the times in question the Duke of Rutland was lawfully exercising sporting rights over certain moors belonging to him. These moors were in certain parts intersected by certain highways. The soil of such highways, subject only to the easement of passing and repassing which belonged to the public, was vested in the said duke, he being the owner of the lands on each side adjoining the said highways. Butts were erected, at some places near the

said highways, at other places at a distance of 200 yards from the highways, for the purpose of the sportsmen concealing themselves from the grouse which were to be driven towards them. The vision of the grouse is signally acute, and very little will induce them to shy away from the butts and follow a course which would be out of reach of the guns of the sportsmen occupying the butts. The plaintiff, knowing this and believing that he had cause of annoyance with the duke or with his predecessor in title, placed himself, avowedly and admittedly, on the highway in such a position and so acted as to prevent the grouse from approaching the butts. The plaintiff had done this on former occasions, and had threatened to continue so to act whenever the duke drove his moors. Some years before the moors had been let to a tenant. During that time the plaintiff, who had been paid by the tenant, had desisted from any interference with the shooting on the moors; but, so soon as the duke resumed the shooting on his moors, so soon did the plaintiff renew his interference with the sport. It was an undisputed fact in the case that the plaintiff did not use the soil of the highway as one of the public for passing and repassing, or for the legitimate purpose of travel, but was at the times in question using it for the purpose of interfering with and obstructing the legal right of the duke to exercise sporting rights over his said moors. There was a conflict of evidence as to the amount of force used by the defendants in their attempts to prevent the plaintiff interfering with the sport. In these circumstances the Lord Chief Justice directed the jury that the plaintiff was not a trespasser, and that therefore what the defendants did could not be justified; that the defendants had no cause of action on their counterclaim; and that the only question which they would have to consider was whether 5*s.* was enough to compensate the plaintiff for the acts of the defendants. The Lord Chief Justice said: 'I do not think the plaintiff was a trespasser. I do not think, therefore, that what was done to him was lawful': and again: 'The trespass is hardly denied, and is attempted to be justified on grounds that, in my judgement, fail. The trespass, therefore, remains a trespass, not a lawful act. It is an unlawful act. Five shillings has been paid in respect of that unlawful act. In your judgement, is 5*s.* enough? If 5*s.* is enough, verdict for the defendants. If 5*s.* is

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not enough, then verdict for the plaintiff, with such an addition to the 5*s*. as you think on the whole necessary.' The jury thereupon found a verdict for the defendants on the claim, thinking 5*s*. enough, and the Lord Chief Justice ordered judgement to be entered for the defendants on the claim, and for the plaintiff on the counterclaim and pleas justifying the trespass. The result was that, while the defendants succeeded on the issue raised as to the 5*s*. paid into Court, the plaintiff had entered for him the issues raised by the pleas of justification, and had judgement on the counterclaim. This arose from the holding of the Lord Chief Justice that the plaintiff was not, under the circumstances, a trespasser. The plaintiff and defendants both appealed to the Court, the plaintiff seeking judgement for him on the claim so far as the issue with regard to 5*s*. being enough to satisfy the claim was concerned, alleging the 5*s*. to be contemptuous and inadequate; and the defendants seeking to have judgement entered for them on the pleas justifying the trespass and on the counterclaim.

KAY, L. J.—The soil of a highway belongs primâ facie to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or is not a user of the soil as a highway.

The legitimate use of a highway is generally described as a 'right of passage,' or a 'right of passing and repassing.' In 1 Rolle's Abridg. 392 B, pl. 1, 2, referred to and adopted by Lord Mansfield in *Goodtitle* v. *Alker*[1], the law as to highways is thus stated: 'The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil.' In the last-mentioned case it was held that trespass would lie for any interference with the owner's rights in the soil of a highway, and that he may maintain ejectment

[1] 1 Burr. 133, at p. 143.

for an exclusion as by a building upon the soil of the highway. In *Sir John Lade* v. *Shepherd*[1], an action of trespass was brought by the owner of the soil for building a bridge across a ditch, 'the end whereof rested on the highway.' The plaintiff had judgement, the Court saying: 'It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil.' Following these decisions, the grass or trees growing on the sides of the highway are held to be the property of the owners of the soil: *Turner* v. *Ringwood Highway Board*[2]; *Curtis* v. *Kesteven County Council*[3].

The right of the public upon a highway is, in the language of the judges which I have quoted, described as a right of passage. In other cases it is defined as a right of passing and repassing. Probably this is sufficiently accurate and precise to enable any one to determine what in each particular instance is an improper use of the soil. Many of such instances may be too trivial to justify any action or prosecution. That is so in the case of every trespass. If a man walks into the field of another without permission, he is a trespasser; but an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So, if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other, and it is no argument against this well-settled law relating to highways to say that it is capable of such abuse. The answer is that the law of trespass, whether on the soil of a highway or on land over which the public have no rights at all, may be pushed to an extreme in certain cases. But the discretion of a court of justice is as capable of controlling any excessive assertion of right in the case of a highway as in any other case.

The other reported instances of trespass deserve consideration.

In *Dovaston* v. *Payne*[4] cattle were taken by the defendant damage feasant on his land, which adjoined to a highway. It was pleaded that, being on the highway, they had escaped into

[1] 2 Str. 1004.
[2] L. R. 9 Eq. 418.
[3] 45 Ch. D. 504.
[4] 2 H. Bl. 527.

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the land by reason of the owner not having kept the fence which divided it from the road in repair. The plea was held bad because it did not aver distinctly that the cattle were using the highway for the purpose of passing and repassing. So that they might have been trespassing upon it, and an escape from land on which they were trespassing would not be a defence. Heath, J., said that it was no excuse that the fences were out of repair if the cattle were trespassers, and it was necessary to show that they were lawfully using the road; for 'the property is in the owner of the soil subject to an easement for the benefit of the public,' and on the plea it did not appear 'whether the cattle were passing and repassing, or whether they were trespassing on the highway.' In *Stevens* v. *Whistler*[1] it was held by the Court of King's Bench that depasturing cattle upon a highway on one side of which the plaintiff had land was a trespass on that part of the soil of the highway which belonged to the plaintiff. In *Reg.* v. *Pratt*[2] it was decided that a person who went upon the high road with a gun, and attempted to shoot a pheasant which flew over it, was properly convicted of a trespass in search of game under 1 & 2 Wm. IV, c. 32, s. 30, upon the soil of the highway which belonged to the owner of the close adjoining such highway. 'He was on land,' said Lord Campbell, C. J., 'the soil and freehold of which was in the owner of the adjoining land. It is true the public had a right of way there, but subject to that right the soil and every incident to the ownership of the soil was in' the owner of the adjoining land. Wightman, J., said: 'Though the public have a right to pass and repass on land which is a highway, they have no right to use the land for any other purpose than as a highway, and the appellant being on such land in pursuit of game was primâ facie a trespasser.' Erle, J., said: 'It is said he could not be a trespasser because it was a highway. But I take it to be clear law that if, in fact, a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser like the cattle in *Dovaston* v. *Payne*[3].' Crompton, J., said: 'If a man use the land over which there is a right of way for any purpose lawful or unlawful other than that of passing

[1] 11 East, 51.

[2] 4 E. & B. 860.

[3] 2 H. Bl. 527.

and repassing he is a trespasser.' These authorities were considered and followed by the Court of Queen's Bench in *St. Mary Newington* v. *Jacobs*[1], where the law is stated thus: 'The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith.' Mellor, J., who delivered the judgement of the Court, comments thus on *Reg.* v. *Pratt*[2]: 'Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway.' The Court held that the owner of premises adjoining a highway, who had offered to take up the flags of a footpath and replace them by hard materials to enable him to cart heavy machinery into his yard, was not liable for damage done to the flags by carting the machinery over them, when his offer had been refused.

According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it.

The peculiarity of the decision in *Reg.* v. *Pratt*[2] is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and repass. If he had gone along the highway with the purpose of reaching a covert near the highway and taking game in that covert, though he might be a trespasser in that covert, I should not think he was a trespasser upon the highway. But, if a man goes along a highway for the purpose of cutting down the trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway, or doing upon the highway itself—in the words of Crompton, J.—

[1] L. R. 7 Q. B. 47. [2] 4 E. & B. 860.

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any act 'lawful or unlawful other than that of passing and repassing, he is a trespasser.' The words must be read with the obvious qualification that the 'purpose' they refer to must be a purpose of using the soil of the highway itself otherwise than by merely passing and repassing.

In this case the highway was a cart and carriage-road across a moor. The Duke of Rutland had the right of sporting over the moor. The soil in it and in the highway, I understand, belonged to him. He had butts, in which people stood to shoot grouse driven over them from the moor. These butts were some two hundred yards from the road, so that shooting from them would not infringe the provisions of s. 72 of 5 & 6 Wm. IV, c. 50, which prohibits any person from wantonly firing off any gun within fifty feet of the centre of any carriageway or cartway. Some old butts were within the prohibited distance. It was proved that the plaintiff went upon this high road during a grouse drive for the express purpose of preventing the grouse from flying towards the butts, and thus interfering with the right of sporting which was being exercised by the duke's friends. On this point the evidence was so conclusive that we are told the Lord Chief Justice said it was superfluous to produce any more witnesses to prove it. The keepers seized the plaintiff, threw him down upon the road, and held him there during the grouse drive, to prevent his further interference.

The Lord Chief Justice directed the jury that the plaintiff was not trespassing. Under that ruling they found that a nominal sum of 5*s*. paid into Court was sufficient damages for the assault upon him. Counsel then said that, after his lordship's ruling, he could hardly press the counterclaim, which asserted that the act of the plaintiff was a trespass, and sought for an injunction to restrain the plaintiff from repeating it. This counterclaim is in fact a cross-action seeking equitable relief, which may now be brought in the Queen's Bench Division: see s. 24, sub-s. 3, Judicature Act, 1873. Where a trespass is committed in assertion of a fancied right, and it is shown that it will be repeated unless prevented, the Court of Chancery has constantly granted injunctions to prevent a repetition of the trespass.

Upon this point there is now before us a cross-appeal by the defendants. They asked for an injunction; but, upon being

pressed by me, counsel said he would not insist upon the injunction, but desired the decision of this Court by declaration whether or not the act of the plaintiff was a misuse of the soil of the highway which amounted to a trespass. It is not unusual in the Chancery Division to make such a declaration without going on to grant an injunction. It clearly may be done under Order xxv, r. 5.

Whatever may be thought of the so-called sport of standing in a butt and shooting at grouse driven over, it is not prohibited by law; and, subject to the provisions of the statute to which I have referred for the protection of wayfarers upon the high road, it is a not unlawful exercise of the right of the owner of the land.

The plaintiff went upon this highway, not for the purpose of exercising as one of the public his right of passage, but of interfering with the grouse drive by placing himself upon the soil of the highway so as to prevent the grouse from flying over the butts. In his own language, taken from his evidence, he says: 'I certainly meant to take up my position in front of the butts: I went there to defend the public right.' With great deference, I am unable to agree that this was a use of the right of passing along the highway. I think it was an abuse of that right. In other words, it was a use of the soil of the highway for another purpose, which use interfered, and was intended to interfere, with a right which was then being exercised by the owner of the soil, and was incident to that ownership. Such a misuse of the soil of a highway is a trespass. There seems to have been sufficient evidence that the plaintiff was not only asserting a right to do what he did, but also that his intention was to repeat his interference. This strictly would entitle the defendants to the assistance of the Court by injunction to prevent a repetition of the act. But this is not pressed for; and I think that the defendants are entitled at any rate to a declaration under Order xxv, r. 5, upon their counterclaim that under the circumstances the plaintiff, upon October 8, 1890, when stopped by the duke's keepers, was trespassing upon the soil of the highway. I am not so much impressed with the consequences of granting an injunction. The Court exercises the power of enforcing such an order by imprisonment with very great care and caution.

The damages given to the plaintiff for the alleged assault upon

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him by the keepers on the assumption that he was not a trespasser were only 5*s*. They would not be more on the ruling that he was a trespasser, and the defendants do not ask to alter the amount. The plaintiff's appeal fails, and must be dismissed. The defendants' appeal succeeds. Plaintiff's claim is dismissed with costs. The defendants' counterclaim is allowed with costs.

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ESHER, M. R., and LOPES, L. J., delivered judgements to the same effect.

Judgement accordingly.

NOTE.—See *Hickman* v. *Maisey* (1900), 1 Q. B. (C. A.) 752.—[ED.]

1766. WILSON *v.* MACKRETH, 3 Burr. 1824.

A person enjoying an exclusive right to an incorporeal hereditament in the soil of another can bring trespass for disturbance of the enjoyment of that right.

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WILSON v. MACKRETH.

This was an action for trespass for entering the plaintiff's close called Carr-Moss, and digging and carrying away his turf and peat: and the general issue was joined.

It was tried at the last assizes for Westmoreland before Mr. Justice Gould: and upon the trial it appeared in evidence—

That the plaintiff was seised in fee of a freehold tenement in the manor of Upper Staveley whereof Lord Suffolk and Sir James Lowther, Bart., were lords, in which manor there is a large waste called Staveley-Head Fell, upon which there are divers large mosses, out of which turves and peats are usually dug. That the plaintiff and all those whose estate he hath in his said tenement hath time out of mind had and used an *exclusive right* of digging turves in a certain moss in the said waste called Carr-Moss, marked and bounded out from six other tracts of moss in the said waste by certain meer-stones; which tracts are and have been also used and enjoyed in the like manner as turbaries by the owners of six other tenements, whereof other persons are in the like manner seised in fee, and lying within and holding of the said manor; saving that two of the said turbaries have been sold off from two of such tenements, and used by purchasers.

That all these mosses lie contiguous and open to the rest of the

waste; and the other tenants of the said manor, as well as the owners of the said tenements, have common of pasture on the said waste, and feed on these mosses as well as on the rest of the waste. That the other tenants of the said manor also got turves on other mosses in the said waste, but not in any of the above seven mosses. That the plaintiff and other owners of the seven mosses have sold the peats arising from those mosses respectively. That the defendant dug and carried away peats in the place in question.

Whereupon a verdict was given for the plaintiff, subject to the opinion of this Court (B. R.) upon the following question—'Whether upon the above state of the case this action was maintainable.'

Mr. Wallace for the plaintiff insisted that he was entitled to maintain an action of trespass. Their objection is 'that it ought to have been an action upon the case.' To prove that trespass would lie in this case, he cited 2 Ro. Abr. 540; Moore, 302; *Welden* v. *Bridgewater* and Bro. Trespass, 55. Here the plaintiff had an exclusive right, and held it separate from every other right, though charged with an incumbrance for the purpose of pasture only. The plaintiff is the owner of the soil.

Mr. Wedderburn, *contra*, for the defendant.—The plaintiff had no right of ownership either in the soil, or in the profits of the soil. Therefore he cannot maintain trespass *quare clausum fregit*. This moss has been allotted to several persons, for the purposes of turbary only: but other tenants of the manor of Upper Staveley have the right of common upon it. This division of this moss amongst the tenants of the seven tenements has been made for the mutual convenience of the general number of the tenants of the manor entitled to common of turbary for firing. The plaintiff has no ownership of the soil: he has no right to dig for anything else but for turf only. And if the land was drained or rendered fit for culture or pasture, he would have no right to any improvement of it. It is only a right of turbary in gross. The cases which have been cited are not applicable. The vesture of the land is a right to the land itself.

Mr. Wallace was going to reply, but

LORD MANSFIELD said:—There wants nothing to answer the objection, but to state the case, which I will do, for the sake of the students. [Then he stated the case verbatim.] The plaintiff's

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right is in a several piece of ground, butted and bounded; a separate right of property, to take the profit of the turf, and to dig it for that purpose. The plaintiff has this right exclusively of all others, and the defendant has disturbed him in it. Therefore trespass lies though he has not the absolute right to the soil.

MR. JUSTICE WILMOT.—If this was only a right of common of turbary, trespass *quare clausum fregit* would not lie. But this is an exclusive right to dig turf. It appears from 1 *Inst.* c. 1 [1] under the word 'land' that it is not necessary he should have the whole property of the land. This must be taken to be a grant from the lord of the soil. He stands in the place of the lord of the manor. The property of the turf is in the plaintiff. No other person could maintain this action. Therefore he may. There is a difference between exclusive rights and rights of common. In the former case the grantee may take away thorns cut: but the commoner can not: Yelv. 187, 188; *Dewclas* or *Douglas* v. *Kendall*, Cro. Jac. 256, s. c. These mosses are severed and six of them enjoyed by other people: therefore decisively a separate right, and therefore the plaintiff may support this action of trespass.

MR. JUSTICE YATES said it was a clear case: for wherever there is an exclusive right trespass lies, and this is clearly an exclusive right. I do not see that this right differs from a right to a sole and separate pasture, for a time: and in that case, during that time trespass lies.

MR. JUSTICE ASTON was of the same opinion, and he mentioned the case of *Doe* v. *Taylor*, in Moore, 355, where the second error assigned was 'that trespass did not lie *quare clausum fregit*, because the soil was not granted.' But all the Court held 'that it did lie'; although they granted that the soil did not pass: for he who has *herbagium*, *pastura*, &c., shall have trespass *vi et armis*.

Per Cur., unanimously:
Let the *postea* be delivered to the plaintiff.

[1] V. Co. Litt. p. 4 ab.

1801. GRAHAM *v.* PEAT, 1 East, 243.

Any possession is sufficient to entitle the possessor to maintain trespass against a wrongdoer.

Trespass *quare clausum fregit.* Plea, the general issue (and certain special pleas not material to the question). At the trial before Graham, B., at the last assizes at Carlisle, the trespass was proved in fact; but it also appeared that the *locus in quo* was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shown for his absence. Whereupon it was objected that the action could not be maintained, the lease being absolutely void by the Act of the 13 Eliz. c. 20, which enacts, 'That no lease of any benefice or ecclesiastical promotion with cure or any part thereof shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every such lease immediately upon such absence shall cease and be void.' And thereupon the plaintiff was nonsuited.

A rule was obtained in Michaelmas Term last to show cause why the nonsuit should not be set aside, upon the ground that the action was maintainable against a wrongdoer upon the plaintiff's possession alone, without showing any title.

Cockell Serjt., Park, and Wood, now showed cause, and insisted that possession was no further sufficient to ground the action even against strangers than as it was primâ facie evidence of title, and sufficient to warrant a verdict for the plaintiff, if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provisions of an Act of Parliament, without any colour of title even against strangers: 1 Leon. 307. He was not even so much as tenant at sufferance; though it is not certain that this latter can maintain trespass. It is settled that the plaintiff could not have maintained an ejectment against a stranger who had evicted him[1]. It appears from Plowd. 546, that there must not only be a possession in fact of land to maintain

[1] Doe d. *Crisp* v. *Barber*, 2 T. R. 749.

1801.

GRAHAM v. PEAT.

trespass, but the possession must be lawful at the time. And an instance is given, if the king be seised in fee, and a stranger enter upon him claiming title, and continue in possession a year and a day, yet he cannot maintain trespass against a wrongdoer. And though 5 Com. Dig. 537 says that he may, yet the authority cited for it does not warrant the position, and is directly contrary to an adjudged case in 4 Leon. 184. (LORD KENYON: That goes upon artificial reasoning that the king cannot be dispossessed by an intruder, and does not apply to other cases.) Suppose there had been a plea of soil and freehold of the rector, and that the defendant as his servant and by his command entered, &c.; it being settled that there cannot be a traverse to the command, the plaintiff must either have traversed its being the title of the rector, or have shown a legal possession consistent therewith, as that he had a lease from him; and then it would have been shown in answer that the lease was void by the statute; and either way there must have been judgement against the plaintiff. Now it was equally competent to the defendant to avail himself of this upon the general issue.

Law, Christian, and Holroyd *contra* were stopped by the Court.

LORD KENYON, C. J.—There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrongdoer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrongdoer. Suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be his dwelling-house notwithstanding the defect of his title under the statute.

Per Curiam, Rule absolute[1].

[1] 'Whoever is in possession may maintain an action of trespass against a wrongdoer to his possession': *Harker* v. *Birbeck*, 3 Burr. 1563; so *Cary* v. *Holt*, 2 Stra. 1238. 'Trespass is a possessory action founded merely on the possession, and it is not at all necessary that the right should come in question': *Lambert* v. *Strother*, Willes' Rep. 221.

1827. BUTCHER *v.* BUTCHER, 7 B. & C. 399.

A person having the legal right to enter upon land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of such entry, wrongfully continues upon the land.

1827.

BUTCHER *v.* BUTCHER.

Trespass for breaking and entering the plaintiff's close, mowing, and cutting down the grass, corn, and crops; and taking and carrying away the hay, corn, and crops of the plaintiff. Plea, first, not guilty. Secondly, *liberum tenementum*. At the trial before Garrow, B., at the Summer Assizes for the county of Bucks., 1827, it appeared that the plaintiff and defendant were the sons of George Butcher, who in 1761 was admitted a copyhold tenant to the close in question, to hold to him the said G. Butcher, the elder, W. S. Butcher, his second son, and G. Butcher, the younger, his eldest son (the plaintiff), for the term of their lives, and the lives and life of the survivors and survivor. George Butcher, the father, died in 1807. W. S. Butcher remained in possession of the close in question, from that time to January, 1827, when he died, and by his will devised the close to John Butcher, the defendant, in fee, and appointed him sole executor of his will. The defendant entered into possession of the close as devisee. On March 10, 1827, the plaintiff and his servants cut the chain which fastened the gate of the close, and entered the same and began to plough the land; the defendant then ordered the plaintiff's men to leave the close. On June 21 the defendant mowed the grass growing in the close, made it into hay, and afterwards carried it away. Upon this evidence, it was contended by the defendant's counsel, that the plaintiff had not a sufficient possession of the close in question to entitle him to maintain trespass; because a party who has the freehold in law, but not the actual possession, cannot maintain trespass: Com. Dig. Trespass (B 3), and 2 Roll's Abr. 553. Trespass, pl. 45. Here the defendant continued in actual possession. Assuming that the plaintiff by entering acquired a concurrent possession with the plaintiff, that is not sufficient; he ought to have the exclusive possession: *Stocks* v. *Booth*[1]. On the other hand, it was insisted, that the plaintiff by entry had acquired the freehold in deed, and a possession quite sufficient to maintain trespass. The defendant, having no right to the land,

[1] 1 T. R. 428.

1827.

BUTCHER v. BUTCHER.

entered upon the death of the tenant for life, before any entry of him in remainder; he was, therefore, an intruder, and in the case of intrusion, entry by the legal owner is the summary remedy; and in 3 Bl. Com. 175 it is said, 'Such an entry gives a man seisin, or puts into immediate possession him that hath immediate right of possession on the estate, and thereby makes him complete owner, and capable of conveying it from himself either by descent or purchase,' and accordingly it is laid down in 2 Roll's Abr. 554, pl. 5, that if a man be disseised after his re-entry, he may maintain trespass against the disseisor for any trespass done by him since the disseisin, for by his re-entry his possession is restored from the beginning. The learned judge was of opinion that the plaintiff had, by entering upon the land, acquired possession sufficient to entitle him to maintain trespass, and a verdict was found for the plaintiff, with £5 damages, with liberty to the defendant to move to set it aside, and enter a nonsuit.

Robinson now moved accordingly. Although the legal title to the premises was in the plaintiff, and he had a right to enter, and by entry acquired a possession, the defendant had, at least, a concurrent possession with the plaintiff. Besides, in order to vest the possession in the plaintiff by entry, that entry ought to have been formal, and accompanied with a declaration that he entered to assert his title[1].

LORD TENTERDEN, C. J.—If he who has the right to land, enters and takes possession, he may maintain trespass. It is not necessary that the party who makes the entry should declare that he enters to take possession; it is sufficient, if he does any act, to show his intention. Here his servants ploughed the land. It is manifest, therefore, that he intended to take possession.

BAYLEY, J.—*Taunton* v. *Costar*[2] is an authority to show that a party wrongfully holding possession of land cannot treat the rightful owner, who enters on the land, as a trespasser. I think that a party having a right to the land, acquires by entry the lawful possession of it, and may maintain trespass against any person who being in possession at the time of his entry, wrongfully continues upon the land.

Rule refused.

NOTE.—See also the report of this case in 1 M. & Ry. 220, and especially note (*c*) on p. 221.—[ED.]

[1] 3 Bl. Com. 174.

[2] 7 T. R. 431.

1855. BARNETT *v.* LORD GUILDFORD, 11 Ex. 19.

To maintain trespass the plaintiff must be in possession. But where the rightful owner of land has been excluded from possession, upon his entry his possession relates back to the date at which his legal right to enter first accrued, and he can maintain trespass and recover damages as from that date.

1855.

BARNETT *v.* LORD GUILDFORD.

Trespass for breaking and entering certain land of the plaintiff at Great Easton, in the county of Leicester, and taking the grass and crops growing thereon, &c., and expelling the plaintiff from the possession thereof for a long time, during all which he was prevented from taking the issues and profits thereof.

At the trial, before Maule, J., at the Leicestershire Summer Assizes, 1854, the following facts appeared:—The plaintiff was the only son and customary heir of Elizabeth Muggleton, who at the time of her marriage with Joseph Barnett, the plaintiff's father, was seised in fee of the land in question, which was copyhold of the manor of Great Easton in Leicestershire. The defendant was lord of that manor. The plaintiff's mother died in December, 1838, so seised of the land in question, the plaintiff being then an infant of the age of two years. On her death (there being no tenancy by the curtesy in the manor), the plaintiff became entitled as her heir, and his father entered upon the land on his behalf, and continued to hold it until the defendant seized *quousque*. In January, 1852, the defendant brought an action of ejectment, which was undefended, and in March, 1852, the sheriff executed a writ of possession. The defendant then let the land to one Rhodes. In October, 1852, the plaintiff's father attended a manor court and demanded the admission of his son, and at the same time tendered the amount of the fine and fees; but the steward refused to admit him unless the costs of the ejectment were also paid. An action was afterwards brought for these costs, and they were paid into Court. In July, 1853, the plaintiff's father paid the fine and fees and demanded from Rhodes, the tenant, possession of the land, which was refused. In the following November he was admitted as guardian of the plaintiff, and entered into possession. Rhodes, during his occupation, had done great injury to the land.

Under these circumstances, it was submitted on behalf of the defendant, that the plaintiff had not at any time, as against the

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BARNETT v. LORD GUILDFORD.

lord, such a possession as to enable him to maintain trespass. On behalf of the defendant it was contended, that the tender and refusal of the fine and fees rendered the subsequent possession of the lord unlawful. The learned judge was of opinion, that the plaintiff was entitled to recover in respect of the wrongful occupation by the lord between the periods of July and November; but his lordship left it to the jury to say whether, in point of fact, there had been an entry prior to the admittance, and the jury found in the negative. The verdict was then entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

Macaulay, in the following term, obtained a rule *nisi* to enter the verdict for the defendant on the ground that, under the above circumstances, trespass was not maintainable; against which

Mellor and Hayes showed cause.

The judgement of the Court was delivered by

PARKE, B.—The question in this case arises upon a motion for a new trial, upon some points reserved, in an action of trespass brought against the lord of the manor by an infant heir of a copyholder, and tried before my Brother Maule at the Summer Assizes at Leicester. The only remaining point undisposed of by the Court, when the case was heard during last term, is, whether the infant copyholder, who had been admitted by the lord to his copyhold, and by his father and guardian had actually entered into possession in November, 1853, could maintain an action of trespass for the wrongful occupation by the lord of the land for a prior period of three months, ending in November. As the heir at law cannot maintain trespass without entry, the simple question is, whether, after entry, his right of possession relates back so as to support an action against a wrongdoer for a trespass committed at an antecedent time.

Most of the authorities upon the question were brought before us by the learned counsel on both sides, and the result is, that the point is left in some degree of uncertainty, it never having been actually decided. In Buller's *Nisi Prius*, p. 87 b, it is stated to be doubtful whether the actual entry (which is on all hands admitted to be necessary to give a right of action to a person who has not been in actual possession of land), will enable him to recover not

only for trespasses subsequent to the entry, but also by relation, for those which have been committed since the title accrued. The same prevailing doubt has been expressed, in somewhat similar terms, in my Brother Adams's book on *Ejectment*, 342, with an inclination that the better opinion was in favour of the title by relation; and to the same effect is 2 Starkie, 435, third edition, with a strong intimation that the relation exists.

In more recent times, the case has incidentally come under the consideration of the Courts. In the case of *Litchfield* v. *Ready* [1], in which the plaintiff brought an action of trespass for the mesne profits against the lessee of the mortgagor, this Court held that the action would not lie; and in delivering judgement I expressed an opinion, that the doctrine of the relation of an entry to the prior title was confined to the case of *disseisin*, referring to the citations in Comyns's Digest, *Trespass* (B. 2). In the case of disseisin, the authorities are clear as to the right of the disseisee to recover against the disseisor or a stranger, after re-entry. The entry, however, has no relation to make him who comes in by title under the disseisor, as his feoffee or lessee, a trespasser; but, in such case, the disseisee shall recover all the mesne profits against the disseisor, both those taken by himself and by his feoffee or lessee: *Liford's Case* [2]. Where there is an abatement, it is said [3], if the heir enter on the abator, he shall not have trespass against him for the wrong before; and 2 Rolle's Abridgement, *Trespas per Relation* (T.), pl. 3, is cited in support of that proposition; and the reason given in Rolle is, that it cannot relate to settle the *possession in him ab initio*, where he had never any before; and if this were law, it would be in favour of the argument, that no action of trespass would lie in this case, for the infant never had the possession, and the case bears a strong analogy to if it be not one of abatement. But we find that the doctrine, that no relation exists in abatement, is not clearly established. It is contrary to the case in the Year-book 19 Hen. VI, 28 B., which is referred to in 2 Rolle's Abridgement, *Trespas per Relation* (T.), pl. 3, as being *contra*. Newton, J., there laid down distinctly, that the relation prevails in the case of abatement as well as disseisin; at the same time it must be observed, that, in the Year-book 22 Hen. VI, 48 B., Ayscoghe, J.,

[1] 5 Exch. 939. [2] 11 Rep. 51 a.
[3] Com. Dig. *Trespass*, B. 3.

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seems to have been of opinion, that the heir, after entry on an abator, could recover for a subsequent continuance in possession, but not for that which was prior. The point, therefore, is not very clear. It is, however, highly reasonable that the relation should take place, otherwise the heir would have no remedy for trespasses committed by the abator, however great, which might go to the destruction of the value of the freehold itself. It may be said, that it is the fault of the heir at law not to have entered before, and that he suffers by his own laches, which is not the case where an administrator sues for mesne injuries, and where the law clearly gives that relation, as will be afterwards mentioned. But still it may happen, that serious injuries may be done to the estate before the heir could enter, for which the law ought to afford redress; and he may be an infant, he may be absent, he may be ignorant of the death of the ancestor, and in all these cases it would be very unjust that he should have no remedy for a great wrong. This case from the Year-book 19 Hen. VI, 28 B., and these considerations, create a great doubt whether I was justified in saying, that the doctrine of relation in actions of trespass to real property was confined to cases of disseisin.

As to trespasses with respect to personal chattels, the law undoubtedly establishes a relation for the purposes of justice. Though the title of the administrator to personal chattels accrues only by the grant of administration, it is quite settled that there is a relation to the death of the intestate so as to recover for mesne injuries to them, or for their conversion; otherwise there would be no remedy for the wrong done, and the relation is allowed for that reason: Com. Dig. *Administration* (B. 10); and, by parity of reasoning, the law ought to give a relation to enable the administrator to recover for mesne injuries to leasehold property; and Lord Ellenborough, in *Rex* v. *The Inhabitants of Horsley*[1], seems to have been of opinion that such relation existed. Whether, in order to bring an action of trespass, he should make an actual entry, his lordship does not state.

But the strongest argument urged in favour of the doctrine by relation in actions of trespass to land arises from the practice in actions for mesne profits, which forcibly struck the mind of Mr. Justice Coltman, as is stated in the report of the case of *Tharpe*

[1] 8 East, 410.

v. *Stallwood* [1]. It appears to be the established practice in these actions, where the plaintiff seeks to recover profits anterior to the day of the demise from the tenant in possession, or at any date from an occupier not the tenant in possession, that the plaintiff may recover them if he proves his title to the possession at the time the profits were so taken, and also the execution of the writ of possession or actual possession taken; for taking actual possession has the same effect as the execution of an *habere facias possessionem*, as explained in a note of my Brother Manning in *Butcher* v. *Butcher* [2]: 2 Starkie on *Evidence*, 453, third edition; Adams on *Ejectment*, 342, second edition; Roscoe on *Evidence*, 579. If this be so, upon what principle can it be, as Mr. Justice Coltman observes in the place cited, except that the person so entering and taking possession was entitled thereby to those profits at the time they arose, and that can only be by relation back of the entry to the actual title as against the wrongdoer. To these profits the doctrine of estoppel by the record in ejectment cannot possibly apply; and, therefore, it is not by means of the fiction of an ejectment, but by virtue of the relation back at common law, that they are recoverable.

We think, therefore, upon full consideration of this important question, that the argument that there is a relation back from the time of actual entry to the time of the legal right to enter, must prevail,—a relation created by law for the purpose of preventing wrong from being dispunishable, upon the same principle on which the law has given it in other cases. Therefore the rule will be discharged.

Rule discharged.

NOTE.—For the exceptions engrafted upon this rule by modern legislation, see *Dunlop* v. *Macedo* (1891), 8 T. L. R. 43. This was an action by a mortgagee against a tenant of the mortgagor (who became tenant after the date of the mortgage), claiming possession of the demised land and mesne profits. The defendant raised the technical defence that the plaintiff could not claim mesne profits in an action for possession, since he had never been actually in possession, and had neither recovered judgement in ejectment nor made a formal entry. Wills, J., in giving judgement for the plaintiff summarized the old law as follows: 'Under the old law the action for mesne profits was an action for trespass. Trespass required that the plaintiff should have been in possession and that the defendant should have interfered with that possession. A plaintiff who had never been in possession

[1] 5 M. & Gr. 760.

[2] 1 M. & R. 221; 7 B. & C. 339.

1855.

BARRETT v. LORD GUILDFORD.

could only maintain this action by a legal fiction, that, as soon as judgement in ejectment was recovered, and entry made (whether by writ of possession or *in pais*), the entry related back, either to the date of the fictitious demise or to any antecedent period at which the title could be shown to have accrued. Under these circumstances, when there had been no actual entry, it was necessary to recover in ejectment and execute the writ, or obtain possession under the judgement, in order to get the benefit of the fiction, and so get the evidence of possession necessary for the action of trespass for mesne profits.' The learned judge then proceeds to state that the necessity for judgement in ejectment and entry before bringing an action for mesne profits was abolished, as between landlord and tenant, by the Statute 1 G. IV, c. 87, s. 2, which was re-enacted in substance by s. 214 of the Common Law Procedure Act, 1852; and that by the Rules of the Supreme Court (Order 18, Rule 2) this exemption is extended to other cases.—[ED.]

1840. BROWNE *v.* DAWSON, 12 A. & E. 624.

A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, acquire such possession as will entitle him to maintain trespass against the person whom he has evicted.

1840.

BROWNE v. DAWSON.

Trespass for breaking and entering 'a certain room or apartment of the plaintiff, called the school-room'; and ejecting him from the possession thereof, and keeping him ejected and expelled &c. Pleas, (1) Not guilty. (2) That the said room or apartment in which &c. 'was not at the said time when &c. the room or apartment of the plaintiff.' Conclusion to the contrary. Issues thereon.

The cause was tried before Lord Denman, C. J., at the last Summer Assizes at Dolgelly. The facts proved were stated in the judgement of the Court (delivered as after mentioned) in the following terms. The plaintiff had been master of a school at Corwen, which was under the control of certain trustees; and, as such, had been allowed to occupy a school-house, the subject of the alleged trespass. This had been built by a separate subscription: but it was admitted that, for the purposes of the cause, it must be considered as a part of the school premises, and equally within the control of the trustees. In 1833, and after the plaintiff's appointment, they had drawn up certain rules; one of them provided for the master's dismissal in case of disobedience to the rest; and these rules the plaintiff had signed. For some alleged misconduct or unfitness for his office he had been dismissed, and acquiesced in

the dismissal. This took place on June 29. The premises were then peaceably taken possession of by the trustees, and locked up. On the 30th the plaintiff returned and re-entered by force. On July 4 he was required by notice to depart; and, persisting in remaining there, he was ejected on the 11th, for which the action was brought. The verdict passed for the defendants on the second plea, which denied the plaintiff's possession; the Lord Chief Justice having told the jury that, if the plaintiff went out freely, and gave up possession to the trustees on June 29, he was not, under the circumstances, to be considered in possession, within the meaning of the plea, on July 11.

Three points, discussed at the trial, were ruled in favour of the defendants, and upon these

Jervis now moved for a new trial. . . . The plaintiff was liable to dismissal only on proof that he had broken the rules. The trustees could not turn him out summarily, and without calling upon him for his defence. [LORD DENMAN, C. J.—I was of that opinion. But, if he chose to go out rather than wait for such a proceeding, that alters the case. And, after he had consented to withdraw, and left the premises, his returning to them, and taking off the padlock, and remaining a certain time, could not restore him to possession.] . . .

Cur. adv. vult.

LORD DENMAN, C. J., in the same term (November 17), delivered the judgement of the Court.

Three points were made by Mr. Jervis for a new trial in this case. (His lordship then stated the facts of the case.)

. . . . . .

It was then said that, at all events, the trustees could not dismiss the plaintiff in the middle of a quarter, without calling on him for his defence. What was the precise tenure by which he held his office did not appear distinctly; but the facts and his own acquiescence seem to show that he held during good behaviour. That acquiescence, however, is an answer to this objection; and it is but justice to add that there is no foundation for imputing hardship or injustice to the trustees.

The most important objection, however, was to the direction

1840.

BROWNE v. DAWSON. — Lord Denman, C. J.

given to the jury with regard to the meaning of the second plea. Mr. Jervis urged that the considerations which that involved were not open to the defendants under the language of the plea; that they must be considered as wrongdoers, as they set up no title; and therefore that, as against them, the barest possession was enough for the plaintiff. *Heath* v. *Milward*[1] was cited in support of this argument. We think that case well decided, and agree that the question of title is not to be raised on a plea of possession; we agree also that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrongdoer. But these elementary principles must be understood reasonably. A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him; he had re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on July 1 he could as little have done on the 11th: for his tortiously being on the spot was never acquiesced in for a moment; and there was no delay in disputing it. But, if he could not have denied their possession in the action supposed, it follows clearly that they might deny his in the present action; for both parties could not be in possession.

We think, therefore, that the direction and the verdict were right: and there will be no rule.

Rule refused[2].

1809. CHAMBERS *v.* DONALDSON, 11 East, 65.

In an action for trespass, where the defendant justifies on the ground that his act was committed by the authority of the true owner, and thereby sets up *jus tertii*, such authority is traversable by the plaintiff, in which case the defendant must prove that such authority was given in fact.

1809.

CHAMBERS v. DONALDSON.

To trespass for breaking and entering the dwelling-house of the plaintiff in the parish of Mary-le-bone, &c., the defendants pleaded

[1] 2 New Ca. 98.

[2] See *Newton* v. *Harland*, 1 Man. & G. 644.

that the said dwelling-house at the time when, &c., was and still is the soil and freehold of E. B. Portman, Esq., and that they as his servants and by his command broke and entered the same. The plaintiff replied, admitting the said dwelling-house to be the soil and freehold of E. B. Portman, but stating that one William Green before the said time when, &c., demised the said dwelling-house to the plaintiff as tenant from year to year, by virtue of which the plaintiff entered, &c., and was possessed thereof; and being so possessed, the defendants, as the servants of Green, and *by his command*, committed the trespass complained of; and traversed that they were the servants of E. B. Portman, and *by his command* committed the said trespass in manner and form as in the plea mentioned. To this replication there was a demurrer, assigning for special causes, that though the plaintiff has by his replication admitted that the said dwelling-house was the soil and freehold of E. B. Portman as alleged in the plea; yet by his replication he has stated that Green demised the said dwelling-house to the plaintiff to hold as therein mentioned, without showing any legal title in Green so to do. And also for that the plaintiff by his replication has admitted the said dwelling-house to be the soil and freehold of E. B. Portman, but has not deduced any title from him to Green to enable Green to make the supposed demise to the plaintiff: and also for that the plaintiff has traversed and endeavoured to put in issue an immaterial fact, and no material issue can be taken on the same.

LORD ELLENBOROUGH, C. J.—The position which is laid down in *Trevilian* v. *Pyne*[1], and which has certainly been the general opinion, that upon a plea to an action of trespass, of *liberum tenementum* in another by whose command the defendant entered, the command is not traversable, comes now for the first time that I am aware of to be questioned in a court of law. That opinion was indeed delivered extrajudicially, for the case in judgement was in replevin, and the Court decided that the command there was traversable, because the possession of the place where the goods were taken was not the material point, but the right of the party to take the goods; but certainly in trespass the possession of the place is material. Now, however, that the position comes to be judicially questioned, it is necessary to examine the foundation on

[1] 1 Salk. 107.

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Lord Ellenborough, C. J.

which it rests. And unless the command be traversable, it will be sufficient for a mere wrongdoer, who has invaded the quiet possession of the plaintiff, to plead title in another, and an authority from him; although that other himself did not question the plaintiff's possession. Nay the argument might be pushed further, and it might be contended that the same defence could be set up against a plaintiff who had been in possession for twenty years; and this monstrous consequence would ensue, that the wrongdoer would protect himself under a title which the party himself could not assert in any possessory action. But since it has been settled in subsequent cases, as in *Graham* v. *Peat*[1], *Harker* v. *Birkbeck*[2], that trespass may be maintained by a person in possession against a wrongdoer, we are called upon to strip the wrongdoer of this shield. And unless such a plea can be gotten rid of by traversing the command, this absurdity will follow, that if title be given in evidence under the general issue, the command may be traversed in evidence, as in *Graham* v. *Peat*[1]; when, if the command be pleaded, with title in another, it is not to be traversed. The position, then, standing upon no decided case, but only laid down extrajudicially, and having been contradicted in effect by subsequent decisions with which it is inconsistent, we are brought back to consider what the rule was before on principles of law and common sense: and if the defendant plead soil and freehold in himself, and the plaintiff cannot show in reply any right to the possession against him; that will be sufficient: but if he plead soil and freehold in another, he must also show that he had the authority of that other, and therefore such authority is traversable.

BAYLEY, J.—The question is, whether a mere wrongdoer, when sued for a trespass upon the possession of another, has a right by this mode of pleading to call upon him to set out his title. If the command of the person in whom soil and freehold is pleaded may be traversed, then no other than the person who has the title to the freehold can compel the party in possession to show his own title to that possession: but if the command be not traversable, then every wrongdoer may call on the party in possession to make that disclosure. Trespass is now understood to be a possessory action; but it must cease to be so, if every wrongdoer could in this manner oblige the party in possession to set out his title.

[1] 1 East, 244. [2] 3 Burr. 1563.

GROSE and LE BLANC, JJ., delivered judgement to the same effect. 1809.

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Judgement for the plaintiff.

NOTE.—In *Dobree* v. *Napier*, 2 Bing. N. C. at p. 797, Tindal, C. J., explains the reason for this rule of law as follows: 'The only ground upon which the authority of the servant is traversable at all in an action of trespass, is no more than this—to protect the person or property of a party from the officious and wanton interference of a stranger, where the principal might have been willing to waive his rights.'—[ED.]

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1. Where entry, authority or licence is given to any one by the law, and he abuses it, he becomes a trespasser *ab initio*. It is otherwise where such entry, &c., is conferred by act of party.

2. Mere non-feasance, however, by a party who has authority or licence by the law does not make him a trespasser *ab initio*.

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, September 1, 7 Jac., in London, in the parish of St. Giles's extra Cripplegate, in the ward of Cripplegate, &c., and upon the new assignment, the plaintiff assigned the trespass in a house called the 'Queen's Head.' The defendants to all the trespass *praeter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, 'That the said house *praed' tempore quo, &c., & diu antea & postea*, was a common wine-tavern, of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *praed' tempore quo, &c.*, viz. *hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c.' The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said, 'That one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8*d.*, and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only

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point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment, upon request, is a denying in law) makes the entry into the tavern tortious. And first, it was resolved when entry, authority, or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*: but where an entry, authority, or licence is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in the case of a general authority or licence of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered for *acta exteriora indicant interiora secreta*: *vide* 11 H. IV. 75 *b*. But when the party gives an authority or licence himself to do any thing, he cannot, for any subsequent cause, punish that which is done by his own authority or licence, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such-like: *vide* 12 E. IV. 8 *b*; 21 E. IV. 19 *b*; 5 H. VII. 11 *a*; 9 H. VI. 29 *b*; 11 H. IV. 75 *b*; 3 H. VII. 15 *b*; 28 H. VI. 5 *b*. But if he who enters into the inn or tavern, doth a trespass, as if he carries away any thing; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the king's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. VI. 19 *b*. *Et sic de similibus.*

2. It was resolved *per totam curiam*, that not doing, cannot make the party who has authority or licence by the law, a trespasser, *ab initio*, because not doing is no trespass; and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. VI. 47 *a*. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he

refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g. Temp. E. I, Replevin 27; 27 E. III. 88; 45 E. III. 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point 12 Edw. IV. 9 *b*. For there Pigot, Serjt., puts this very case, If one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, 'The said case which Pigot has put, is not law, for it is no trespass, but the taverner shall have an action of debt:' and therebefore Brown held, 'That if I bring cloth to a tailor to have a gown made, if the price be not agreed in certain before how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt; but the tailor in such a case shall have a special action of debt; *scil.* that *A.* did put cloth to him to make a gown thereof for the said *A.* and that *A.* would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so especially agreed. But in such case he may detain the garment till he is paid, as the hostler may the horse: *vide* Br. *Distress*, 70, and all this was resolved by the Court. *Vide* the book in 30 Ass. pl. 38, John Matrever's case, it is held by the Court, that if the lord, or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends;

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and therewith agrees 7 E. III. 8 *b* in the Master of St. Mark's case, and so is the opinion of Hull to be understood in 13 H. IV. 17 *b*, which opinion is not well abridged in *Title Trespass*, 180. Note, reader, this difference, that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful; tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after; or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the said books in 13 H. IV. 17 *b*; 14 H. IV. 4; *Registr. Judic.* 37; 45 E. III. 9, and all the books before. *Vide* 14 Ed. IV. 4 *b*; 2 H. VI. 12; 22 Hen. VI. 57; *Doctor and Student*, lib. ii. cap. 27; Br. *Distress*, 72; and Pilkington's case, in the fifth part of my Reports, fol. 76; and so all the books which primâ facie seem to disagree, are upon full and pregnant reason well reconciled and agreed.

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A licence to enter upon lands is revocable at the will of the licensor, whether it be by deed or parol, and although valuable consideration has been given for it. In order to make a licence irrevocable, it must either be coupled with an interest, or itself amount to a grant.

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Trespass for assault and false imprisonment.—Plea, that, at the time of the said supposed trespass, the plaintiff was in a certain close of the Earl of Eglintoun, and that the defendant, as the servant of Lord Eglintoun, and by his command, gently laid his hands upon the plaintiff, in order to remove him from the said close, using no unnecessary violence in so doing, which is the same supposed trespass in the declaration mentioned, &c. Replication, that, at the time of the said removal, the plaintiff was in the said close by the leave and licence of Lord Eglintoun. Rejoinder, traversing the leave and licence, and issue thereon.

The judgement of the Court (PARKE, ALDERSON, and ROLFE, BB.) was delivered by

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ALDERSON, B.—This was an action tried before my Brother Rolfe at the sittings after last Trinity Term. It was an action for assault and false imprisonment. The plea (on which alone any question arose) was, that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by *the leave and licence of Lord Eglintoun*. The leave and licence was traversed by the defendant, and issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the inclosure attached to and surrounding the great stand on the Doncaster racecourse; that Lord Eglintoun was steward of the races there in the year 1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand, and the inclosure surrounding it, and to remain there every day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the inclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away, force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

My Brother Rolfe, in directing the jury, told them, that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the inclosure, and that, if the jury were satisfied that notice was given by Lord

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Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question *by the leave and licence of Lord Eglintoun.* On this direction the jury found a verdict for the defendant. In last Michaelmas Term, Mr. Jervis obtained a rule *nisi* to set aside the verdict for misdirection, on the ground, that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the inclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the inclosure by the leave and licence of Lord Eglintoun. Cause was shown during last term, and the question was argued before my Brothers Parke and Rolfe and myself; and on account of the conflicting authorities cited in the argument, we took time to consider our judgement, which we are now prepared to deliver.

That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established, that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed.* In all the authorities and textbooks on the subject, a *deed* is always stated or assumed to be indispensably requisite.

And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a profit *à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land,—it is a right of way and something more: and if we had to decide this case on general principles only, and independently of authority,

it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends, that, without any grant from Lord Eglintoun, he had licence from him to be in the close in question at the time when he was turned out, and that such licence was, under the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him, viz. *Webb* v. *Paternoster*, reported in five different books, namely, Palmer, 71; Roll. 143 and 152; Noy, 98; Popham, 151, and Godbolt, 282; *Wood* v. *Lake*[1], *Tayler* v. *Waters*[2], and *Wood* v. *Manley*[3].

As the argument of the plaintiff rested almost entirely on the authority of these four cases, it is very important to look to them minutely, in order to see the exact points which they severally decided.

Before, however, we proceed to this investigation, it may be convenient to consider the nature of a licence, and what are its legal incidents. And, for this purpose, we cannot do better than refer to Lord C. J. Vaughan's elaborate judgement in the case of *Thomas* v. *Sorrell*[4], as it appears in his Reports. The question there was as to the right of the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts notwithstanding those statutes.

In the course of his judgement the chief justice says[4], 'A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming

[1] Sayer, 3.
[2] 7 Taunt. 374.
[3] 11 Ad. & E. 34; 3 Per. & D. 5.
[4] Vaughan, 351.

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him, they are licences; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or licence may destroy and alter property.'

Now, attending to this passage, in conjunction with the title 'Licence' in Brooke's Abridgement, from which, and particularly from paragraph 15, it appears that a licence is in its nature revocable, we have before us the whole principle of the law on this subject. A mere licence is revocable: but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a licence by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Chief Justice Vaughan, a licence not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land: and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the licence would be irrevocable.

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Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by Mr. Jervis for the plaintiff. The first was *Webb* v. *Paternoster*[1]. That, as appears from the report in Rolle, was an action of trespass, brought against the defendant for eating, by the mouths of his cattle, the plaintiff's hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir W. Plummer leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied, that, before the making of the lease, Sir W. Plummer had licensed him to place the hay on the close till he could conveniently sell it, and that, before he could conveniently sell it, Sir W. Plummer leased the land to the defendant. The defendant demurred to the replication.

From the arguments, as given in Rolle, it appears that the plaintiff's counsel, who was first heard, contended, first, that the licence, being a licence for profit, and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable: and, secondly, even if the licence was revocable, still that the lease to the defendant was an implied, and not an *express* revocation, and therefore was inoperative against him without notice; and for this he referred to *Mallory's case*[2]. To this latter proposition the Court appears to have assented; but Dodderidge, J., suggested, that, even if the licence was in force, still the licenser did not by such a licence preclude himself, nor, consequently, his tenant, from turning cattle on the land, and that the *licensee* ought to have taken care to protect the hay from the cattle. As to this, however, the chief justice expressed a doubt. The defendant's counsel was heard some days afterwards, and he alleged that it appeared by the record, that the plaintiff had had two years to sell his hay before the defendant's cattle had eaten it; and he argued that the Court would say, as matter of law, that this was more than reasonable time; and to this the Court assented. The plaintiff's counsel, in reply, reverted to the distinction between the licence for profit and a licence for pleasure; but Dodderidge, J., denied it, and said that a licence to dig gravel, though a licence for profit, is revocable; and he said that the true distinction was between a *mere* licence, and a licence *coupled with an interest*. Judgement

[1] Roll. 143 & 152 and *supra*, p. 255.

[2] 5 Rep. 111.

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was eventually given for the defendant, on the ground that the plaintiff had had more than reasonable time to sell the hay.

It will be seen, therefore, that the only two points decided were, first, that the question of reasonable time was for the Court, and not for the jury; and, secondly, that two years was more than a reasonable time. The decision, therefore, itself has no bearing on the point for which it was cited; and the only support which the case affords to the doctrine contended for by the present plaintiff is what is said, in the report of the case in Popham, to have been agreed by the Court, namely, that a licence for profit for a term certain is not revocable; a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain, that the licence in *Webb* v. *Paternoster*[1] was not a licence under seal. The defendant's counsel appears, from the report in Rolle, to speak of the plaintiff as *grantee* of the liberty to stack hay, &c.; a form of expression not very appropriate, if used in respect of a party who had a mere parol licence; and the chief justice, according to the report in Popham and Palmer, says that the plaintiff had an interest which charged the land, into whose hands soever it should come. And Dodderidge, J., according to the report in Palmer, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths, says it was folly of the plaintiff that he did not, *together with the licence, take a covenant that it should be lawful for him to fence the hay with a hedge.* From these expressions, (and there are others in the various reports of the case having a similar aspect), it certainly seems possible that the licence was under seal; and then the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land, for a limited time, that limited time had expired. Even supposing the licence to have been a mere parol licence, yet the strong probability is, that Webb had purchased the hay from Sir W. Plummer as a growing crop, with liberty to stack it on the land, and then the parol licence might be good as a licence coupled with an interest. Be this, however, as it may, the decision, as we have already pointed out, has very little, or rather no bearing on the case before us; and the judgement of Dodderidge, J., as given both in Rolle and Palmer, is in strict accordance with what

[1] Roll. 143 & 152 and *supra*, p. 255.

was afterwards laid down by Vaughan, C. J., and which we consider to be consonant both to principle and authority.

The next decision in order of time is that of *Wood* v. *Lake*, in Sayer, p. 3. There the defendant had, by a parol agreement, given liberty to the plaintiff to stack coals on the defendant's land for a term of seven years. After the plaintiff had enjoyed this privilege for three years, the defendant locked up the gate of the close. No report is given in Sayer of the arguments at the bar. But from a MS. report of the same case, referred to by Gibbs, C. J., in the case of *Tayler* v. *Waters*, and which MS. we have had an opportunity of consulting, through the kindness of the representatives of the late Mr. Justice Burrough, it appears that the argument turned wholly on the point whether the privilege of stacking the coals did or did not amount to a lease; for if it did, then the defendant contended it was void after three years, under the Statute of Frauds, as not being in writing. Lee, C. J., and Denison, J., held it to be no lease, nor uncertain interest in land; but Foster, J., doubted, and desired time to consider. On the last day of term, the Court gave judgement for the plaintiff, Foster *non dissentiente*.

Supposing the Court to have been right in deciding that this was not a lease (which, however, is doubted by Sir E. Sugden: see 1 V. and P., last edition, p. 139), yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case, not a single decision is to be found giving countenance to any such proposition; and we are compelled to say, that, if the Court proceeded on the ground that the plaintiff had acquired the easement by the parol licence, we do not think it can be supported. But the case may, perhaps, have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and although the action is stated to have been *an action on the case*, it may have been a mere *assumpsit*—an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to recover, if the contract was not (and probably the Court considered it was not) a contract concerning land, within the fourth section of the Statute of Frauds.

The next case on which the plaintiff relies is *Tayler* v. *Waters*, reported in 7 Taunt. 374. It was an action by the plaintiff against the doorkeeper of the Opera-house, for preventing him from entering

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the house during the performance of an opera. It appeared that one W. Tayler, being in possession of the Opera-house, as lessee for a long term of years, by a deed, dated August 24, 1792, assigned his interest therein to trustees, on various trusts, for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Tayler continued in possession by the permission of the trustees, and he carried on and managed the affairs of the theatre. In March, 1799, he, by deed, granted to one Gourgas, for a valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgas to the plaintiff, in July, 1799, but no deed of assignment to him was executed. In 1800, Tayler's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre, by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the trustees, prevented him from entering the theatre; and for this obstruction the action was brought. The cause was tried before Gibbs, C. J., and a verdict found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgement were, that the right under the silver ticket was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing, and, *consequently*, might be granted without a deed.

The chief justice, in support of that doctrine, relied on *Webb* v. *Paternoster* [1], which, he said, showed that a beneficial licence, to be exercised upon land, might be granted without deed, and could not be countermanded, at least after it had been acted on. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be in writing; as to which last point all doubt, if there remained any, had (he said) been removed by the case of *Wood* v. *Lake* [2].

This judgement is stated by the learned reporter to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. We must infer from this that the attention of the Court was not called in the argument to the principles and earlier authorities, to which we have adverted. Brooke, in his *Abridgement*; Dodderidge, J., in the case of *Webb* v. *Paternoster* [1]; and Lord Ellenborough, in the case of *Rex* v. *Horndon-*

[1] Roll. 143 & 152 and *supra*, p. 255. [2] Sayer, 3.

on-the-Hill [1], all state in the most distinct manner that every licence is and must be in its nature revocable, so long as it is a mere licence. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked licence, become irrevocable; but then it is obvious that the grant must exist independently of the licence, unless it be a grant capable of being made by parol, or by the instrument giving the licence. Now in *Tayler* v. *Waters* [2] there was no grant of any right at all, unless such right was conferred by the licence itself. Gibbs, C. J., gives no reason for saying that the licence was a licence irrevocable, and we cannot but think that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the Court. Again, the chief justice is represented as saying that the interest of the plaintiff was not an interest in land within the Statute of Frauds, and that *consequently* it might be granted without deed. How the circumstance, that the interest was not an interest in land within the Statute of Frauds showed it to be grantable without deed, we cannot discover. The precise point decided in *Webb* v. *Paternoster* [3] is not adverted to, and it is assumed, without discussion, that the licence there must have been a parol licence, and a naked licence, unconnected with an interest, capable of being created by parol. The action was not, as it may have been in *Wood* v. *Lake* [4], an action founded on the contract. It was an action on the case for the obstruction, and was founded on the supposition that an actual right to enter and remain in the theatre had vested in the plaintiff, under the licence conferred by the silver ticket. With all deference to the high authority from which the judgement in *Tayler* v. *Waters* [2] proceeded, we feel warranted in saying that it is to the last degree unsatisfactory;—an observation which we have the less hesitation in making, in consequence of its soundness having obviously been doubted by the Court of King's Bench and Mr. Justice Bayley in the case of *Hewlins* v. *Shippam* [5].

The fourth and last case relied on by Mr. Jervis was the recent case of *Wood* v. *Manley* [6], in the Queen's Bench. That was an action for trespass *quare clausum fregit*: plea, that defendant was possessed of a large quantity of hay being on the plaintiff's close,

[1] 4 M. & Selw. 562.
[2] 7 Taunt. 374.
[3] Roll. 143 & 152 and *supra*, p. 258.
[4] Sayer, 3.
[5] 5 B. & C. 222.
[6] 11 Ad. & E. 34; 3 Per. & D. 5.

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and that by leave of plaintiff he entered on the close in question to remove it. Replication, *de injuriâ*. It was proved at the trial, that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it as a distress for rent. The conditions of the sale were, that the purchaser of the hay might leave it on the close until Lady Day, and might in the meantime come on to the close from time to time, as often as he should see fit, to remove it. *These conditions were assented to by the plaintiff.* The defendant became the purchaser, and afterwards, and before Lady Day, the plaintiff locked up the close. The defendant broke open the gate in order to remove the hay. A verdict was found for the defendant, Erskine, J., telling the jury that the licence to come from time to time to remove the hay was irrevocable. Mr. Crowder moved to set aside this verdict, on the ground that the licence was necessarily revocable, and was in fact revoked. But the Court of Queen's Bench refused to grant a rule, and, we think, quite rightly. This was a case not of a mere licence, but of a licence coupled with an interest. The hay, by the sale, became the property of the defendant, and the licence to remove it became, as in the case of the tree and the deer, put by Vaughan, C. J., irrevocable by the plaintiff; and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them: Vin. Abr. *Trespass*, (H.) a 2, pl. 12; and *Patrick* v. *Colerick* [1].

It appears, therefore, that the only authority necessarily supporting the present plaintiff in the proposition for which he is contending, is the case of *Tayler* v. *Waters* [2], in which the real difficulty was not discussed, nor even stated. It was taken for granted, that, if the Statute of Frauds did not apply, a parol licence was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature of an easement, was by some inadvertence kept entirely out of sight; and for these reasons, even if there had been no conflicting decisions, we should have thought that case to be a very unsafe guide in leading us to a decision, on an occasion where we were called on to lose sight of the ancient landmarks of the common law.

We are not, however, driven to say that we shall disregard that case *merely* on principle. Giving it the full weight of judicial deci-

[1] 3 M. & W. 483. [2] 7 Taunt. 374.

sion, it is met by several others, which we must entirely disregard, before we can adopt the argument of the plaintiff. In the cases of *Fentiman* v. *Smith* [1] and *Rex* v. *Horndon-on-the-Hill* [2], which were before *Tayler* v. *Waters* [3], Lord Ellenborough and the Court of King's Bench expressly recognized the doctrine, that a licence is no grant, and that it is in its nature necessarily revocable, and the further doctrine, that, in order to confer an incorporeal right, an instrument under seal is essential. And in the elaborate judgement of the Court of King's Bench, given by Bayley, J., in *Hewlins* v. *Shippam* [4], the necessity of a deed, for creating any incorporeal right affecting land, was expressly recognized, and formed the ground of the decision. It is true that the interest in question in that case was a freehold interest, and on that ground Bayley, J., suggests that it might be distinguished from *Tayler* v. *Waters* [3]; but in an earlier part of that same judgement, he states, conformably to what is the clear law, that, in his opinion, the quantity of interest made no difference; and the distinction is evidently adverted to by him, not because he entertained the opinion that it really was of importance, but only in order to enable him to decide that case without, in terms, saying that he did not consider the case of *Tayler* v. *Waters* [3] to be law. The doctrine of *Hewlins* v. *Shippam* [4] has since been recognized and acted upon in *Bryan* v. *Whistler* [5], *Cocker* v. *Cowper* [6], and *Wallis* v. *Harrison* [7], and it would be impossible for us to adopt the plaintiff's view of the law, without holding all those cases to have been ill decided. It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference: whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil; and it is sufficient, on this point, to say, that in several of the cases we have cited (*Hewlins* v. *Shippam* [4], for instance, and *Bryan* v. *Whistler* [5]), the alleged licence had been granted

[1] 4 East, 107.
[2] 4 M. & Sel. 565.
[3] 7 Taunt. 374.
[4] 5 B. & C. 222.
[5] 8 B. & C. 288.
[6] 1 C., M. & R. 418.
[7] 4 M. & W. 538.

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for a valuable consideration, but that was not held to make any difference. We do not advert to the cases of *Winter* v. *Brockwell*[1] and *Liggins* v. *Inge*[2], or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case now before us, and were, in fact, admitted not to bear upon it.

In conclusion, we have only to say, that, acting upon the doctrine relative to licences, as we find it laid down by Brooke, by Mr. Justice Dodderidge, and by Vaughan, C. J., and sanctioned by *Hewlins* v. *Shippam*[3], and the other modern cases proceeding on the same principle, we have come to the conclusion, that the direction given to the jury at the trial was correct, and that this rule must be discharged.

Rule discharged.

NOTE.—The point which was left open in the principal case as to the right of a licensee for value to sue the licensor for damages for breach of contract in such a case was decided in favour of the licensee in the case of *Kerrison* v. *Smith* (1897), 2 Q. B. 445.

In the case of *Lowe* v. *Adams* (1901), 2 Ch. 598, Cozens Hardy, J., suggested that since the decision in *Walsh* v. *Lonsdale* (1884), 21 Ch. D. 9, the principal case is no longer law; but no reasons are given for this suggestion.

In Mr. Theobald's valuable work *The Law of Land*, pp. 153 seq., there is an interesting discussion upon the principal case. He first criticizes the opinion of the Court that the interest, if any, attempted to be conferred by the licence was an interest affecting land, analogous to a right of way and such as can only be created by deed. He then proceeds: 'If, then, the licence created no interest in land no deed was wanted. It was a valid legal licence, and it is mere question of construction of the licence whether it was revocable or not; and certainly it cannot be supposed that such a licence was intended to be revocable except for misconduct on the part of the licensee.'

This statement, however, seems to assume the contrary to what has generally been received as an axiom in the law of licences, viz. that a mere licence which is not coupled with an interest is revocable whether made by deed or by parol. This appears to be a rule of law and not of construction. The argument of the Court may be summarized as follows: A licence which is not coupled with an interest is revocable. In order to show that this licence was irrevocable you must prove that it was coupled with an interest. The only interest suggested is a right affecting land analogous to an easement, and this you cannot set up as the licence was not under seal. You are, therefore, left with a bare licence which *ex hypothesi* is revocable whether given for value or not.

The learned author also raises an interesting question as to the point

[1] 8 East, 308. [2] 7 Bing. 682. [3] 5 B. & C. 222.

decided in *Kerrison* v. *Smith* (v. s.)—a point which it may be remarked was not really relevant to the decision of the principal case, as that was an action for trespass and assault. His view is that even if the licence is regarded as a contract, if the decision in the principal case is correct it must be a contract subject to the limitations laid down therein, and therefore revocable, and that it is difficult to understand how the licensee can claim damages for breach of a contract which he knew or ought to have known could be rescinded by the other party at any moment. Perhaps the answer is that the arrangement between the parties is twofold—from the point of view of an action of trespass it is a licence—from the point of view of a contract between the parties there is an implied term that that licence shall not be revoked. This seems to be the explanation which was in the mind of Collins, J., in *Kerrison* v. *Smith*, and is substantially that suggested by Mr. Theobald. He further well points out that the principle of *Walsh* v. *Lonsdale* (v. s.) would not avail a plaintiff in an action for damages, although it might do so if he was seeking to enforce or rely upon an equitable right.—[ED.]

1832. ANTHONY *v.* HANEYS, 8 Bing. 186.

The defendant in an action for trespass may justify an entry upon the plaintiff's close to recover his goods where (1) they have been placed there by the plaintiff; (2) they have been placed there in pursuance of the felonious act of a third person; (3) they have got there by accident.

Trespass for breaking and entering the plaintiff's close. The defendant pleaded (1) the general issue, and (2) that he was the owner of a certain barn, three outhouses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, then standing and being in and upon the close of the plaintiff, in which, &c., wherefore he entered into and upon the said close in order to remove the same, &c. Demurrer and joinder.

Stephen Serjt., was to have argued in support of the demurrer, but the Court called on

Bompas Serjt., to support the plea.

Although, without licence or lawful warrant, a man cannot enter the *house* of another, because every man's house is his castle, yet he may enter the *close* of another to recover his own goods, provided he be guilty of no breach of the peace; and the authorities, if any, which militate against this position are founded on a misconception or misapplication of the case of *Tayler* v. *Friskin* [1], where a plea

[1] Cro. Eliz. 246. See also *Holdringshaw* v. *Rag*, Cro. Eliz. 876, as to licence by a servant; and *Higgins* v. *Andrews*, 2 Roll. Rep. 55.

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that the defendant entered the plaintiff's *house* by leave of his wife, to take goods sold to him by the wife, was held ill. But with regard to a *close*, supposing goods to be lawfully on it—and it is not to be *assumed* that they are there unlawfully—the owner of the close is bound to permit the owner of the goods to enter and take them: he enters, therefore, under an implied licence. In the present case the demurrer admits that the barns and outhouses belonged to the defendant, and the plaintiff not having averred that they were affixed to the freehold or unlawfully on the close, it must be taken that they were chattels, and lawfully there. Now, if trees be blown down, it is no trespass for the owner to enter the land into which they fall, to take them: *Millen* v. *Hawery*[1], Vin. Abr. *Tresp.* H. a. 2. So, if a fruit-tree grow in a hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it. Vin. Abr. *Tresp.* L. a. So, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, he may justify the felling of it upon the other's land: *Dyke* v. *Dunstan*[2]. In like manner he may justify chasing sheep upon another's ground if he cannot otherwise drive them off his own: *Millen* v. *Fandry*[3]. There, 'the point singly was but this; I chase the sheep of another out of my ground, and the dog pursues them into another man's land next adjoining, and I chide my dog; and the owner of the sheep brings trespass for chasing them: and it was argued by Whistler, of Gray's Inn, that the justification was not good, and he cited Co. lib. iv. 38. b. that a man may hunt cattle out of his ground with a dog, but cannot exceed his authority; and by him an authority in law which is abused is void in all; and to hunt them into the next ground is not justifiable. But per Crew, C. J.: 'It seems to me that he might drive the sheep out with the dog, and he could not withdraw his dog when he would in an instant, and therefore it is not like to the case of 38 E. III, where trespass was brought for entering into a warren, and there it was pleaded that there was a pheasant in his land, and his hawk flew and followed it into the plaintiff's ground, and there it seems that it is not a good justification, for he may pursue the hawk, but cannot take the pheasant. 6 E. IV: A man cuts thorns, and they fall

[1] Latch. 13.
[2] 6 Ed. IV. 18.
[3] Poph. 161. See *Sutton* v. *Moody*, 1 Ld. Raym. 250; *Churchward* v. *Studdy*, 14 East, 249.

into another man's land, and in trespass he justified for it; and the opinion was, that notwithstanding this justification trespass lies, because he did not plead that he did his best endeavour to hinder their falling there, yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them out of his own land, and he did his best endeavour to recall the dog, and, therefore, trespass does not lie.' The same principles are laid down in Com. Dig. *Pleader*, 3 M. 42. In the Year Book, 17 H. VI, it is said to be a lawful cause to enter a man's park, to show him evidence to avoid a suit. In all such cases the defendant may be said to have a sort of way of necessity: as where he pursues goods which have been stolen. So, where a common highway is out of repair by the overflowing of a river or other cause, passengers have a right to go upon the adjoining land: *Absor* v. *French*[1]; *Henn's case*[2]. Or, if *A* makes a lease for years, excepting the trees which he would afterwards sell, the law gives the lessor and those who would buy power to enter and look at the trees, for without sight none would buy, and without entry none would see: *Lifford's case*[3]. And a man may enter the land of another to abate a nuisance: Com. Dig. *Pleader*, 3 M. 38.

If the defendant have no right to enter, he may be without remedy, for peradventure upon his demanding the goods the plaintiff may decline to make answer, or in anywise to stir in the affair, and without refusal on the part of the plaintiff as well as demand on the part of the defendant, trover will not lie.

TINDAL, C. J.—The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three outhouses, three leantos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, leantos, &c., were standing on the close in the ordinary acceptation of the term, that is, were affixed to the freehold; and the rather, because the defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to

[1] Show. 28. [2] Sir W. Jones, 296. [3] 11 Rep. 52 *a*.

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get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea which is bad in part, is, under the common rule, bad for the whole, and judgement must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another: that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbour, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken and the owner pursues to obtain possession, the principle is laid down by Blackstone [1], who says, 'As the public peace is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously

[1] 3 Comm. 4.

stolen; but must have recourse to an action at law[1].' A case has been suggested in which the owner might have no remedy where the occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.

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PARK, BOSANQUET, and ALDERSON, JJ., delivered judgement to the same effect.

Judgement for plaintiff.

1881. BEDDALL *v.* MAITLAND, L. R. 17 Ch. D. 174.

A rightful owner who makes a forcible entry on land, though he may be liable to indictment, is not liable to a civil action in respect of such entry. He is, however, liable to an action for any independent wrongful acts committed in the course of or after such entry, even at the suit of a person whose possession was wrongful.

Defendant was tenant at will of a house in a nursery garden as manager for the plaintiffs. The tenancy was determined before January 8, 1880, but the defendant refused to give up possession, and, as was alleged, held himself out as a partner in the undertaking. The plaintiffs thereupon forcibly ejected him from the house on January 8, 1880, and they brought their action in which they claimed relief against the defendant on the ground that he had held himself out as a partner as aforesaid.

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[1] See judgement of Parke, B., in *Patrick* v. *Colerick* (1838), 3 M. & W. 485, where, speaking of the principal case, he says: 'The passage in Blackstone, as to the right of recaption, applies to the case where the goods are placed on the ground of a third party. All the old authorities say that, where a party places the goods upon his own close, he gives to the owner of them an implied licence to enter for the purpose of recaption. There are many authorities to that effect in Viner's *Abridgement*. Thus, in *Title Trespass*, 1 a, it is said: "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." The reason of the judgement of the Court of Common Pleas is, that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shown that they came there by the plaintiff's act.' This case is the authority for proposition (1) in the head-note.—[ED.]

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The defendant delivered a counterclaim in which he alleged that Poulton, aided and abetted therein by Beddall, on January 5, 1880, unlawfully and by force broke into and ejected the defendant from the house occupied by him and violently put him and his family out of the house, and also violently and recklessly threw thereout and unlawfully took possession of and damaged his goods and effects, and by such unlawful acts greatly injured the defendant and caused him damage to the amount of £1,000. And the defendant claimed damages for alleged breaches of contract by the plaintiffs respectively, and also in respect of the injuries alleged to have been committed by them respectively.

By the evidence at the trial it appeared that on January 5, 1880, a Mr. Robertson, who was a clerk to the plaintiffs' solicitors, by the instructions of Poulton went, accompanied by several men, to the nursery to demand from the defendant immediate possession. According to Robertson's evidence, he was admitted without any resistance at the front door of the house, and told the defendant what he had come for. They had some conversation together, and they then went out of the house together to look at the stock in the nursery. While they were outside, the defendant suddenly ran back into the house and locked the door, and refused to allow Robertson to re-enter. Robertson, then, with the assistance of the men he had brought with him, forcibly broke open the back door of the house. The defendant offered no further resistance, and then Robertson and his men turned the defendant and his family out, and put his furniture out of the house.

According to the defendant's evidence, Robertson obtained possession in the first instance by force.

FRY, J., gave judgement for the plaintiffs on the claim, with costs, and dismissed the counterclaim, except as to the claim for damages in respect of the alleged forcible entry and injury to the defendant's furniture, upon which he reserved his judgement.

March 8. FRY, J.—The question which I reserved for further consideration arises on the defendant's counterclaim. [His lordship read the allegations as to the forcible entry, and the claim for damages founded upon it.] The claim subdivides itself into two heads, the one for the forcible entry and eviction, the other for the injury done to the defendant's furniture and effects, and, in my judge-

ment, separate considerations arise with regard to these two heads. According to the evidence the defendant was, in my judgement, in possession of the house by leave of the owners, it having been occupied by him as the manager of the nursery. He was not in possession of the house in the same sense as he was in possession of the nursery; with regard to the nursery he was in the position of an ordinary servant, being only the manager for the plaintiffs; but he was by the plaintiffs' permission in the exclusive possession of the house. That permission, however, had been withdrawn before the 8th of January, and the defendant had retained possession and was then in possession as a wrongdoer. Upon the evidence I come to the conclusion that a forcible entry was made by Robertson on the 5th of January as agent of the plaintiff Poulton only, but that the plaintiff Beddall had nothing to do with it. Different accounts of what took place are given by Robertson and by the defendant, but it appears to me immaterial which account is true, for in either view the defendant's possession at the time when the forcible entry was made was wrongful. The questions which then arise are complicated by this consideration, that, if the possession of the defendant was unlawful, the forcible entry of the plaintiff was also unlawful. The taint of unlawfulness attaches to them both. The unlawfulness of the plaintiff's entry arises under the Statute 5 Rich. II, Stat. 1, c. 8, which enacts, 'That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.' This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the

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forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Rich. II creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases. The leading authority on the subject is *Newton* v. *Harland* [1], a case in which a great difference of opinion was evinced between the learned judges before whom it came. It was tried three times, first before Baron Parke, secondly before Baron Alderson, and thirdly before Mr. Justice Coltman, and came three times before the Court of Common Pleas in Banc, and it must, in my judgement, be taken as having settled the law on the subject. The action was brought to recover damages for an assault committed on the plaintiff's wife in the course of a forcible entry by the defendant into some apartments which had been occupied by the plaintiff as tenant to the defendant. The plaintiff remained in the apartments after the expiration of his term, and the defendant entered by force and turned out the plaintiff's wife and family, and in so doing assaulted the wife. The defendant pleaded that the acts were done in defence of his possession of the house, and the Court of Common Pleas held, contrary to the opinions of Baron Parke and Baron Alderson, that the defence failed, because the defendant's entry was unlawful. On the other hand, when the cause of action alleged is simply the eviction, no damages can be recovered. That is the result of *Pollen* v. *Brewer* [2], and it is also clear from other cases. No doubt, in *Harvey* v. *Brydges* [3], Baron Parke and Baron Alderson expressed their disapproval of *Newton* v. *Harland* [1], but they were the judges who had tried that case, and whose opinions had been overruled by the Court in Banc. In *Davison* v. *Wilson* [4]—an action for eviction—it was held that the averments in the declaration 'with force and arms, with a strong hand, and against the form of the statute,' were, on the pleadings, allegations of matter of

[1] 1 Scott, N. R. 474.
[2] 7 C. B. (N. S.) 371.
[3] 14 M. & W. 437.
[4] 11 Q. B. 890.

aggravation only, and not of a separate cause of action, and therefore the plea of *liberum tenementum* prevailed. The case of *Meriton* v. *Coombes* [1], in my opinion, supports the same view. The only other case to which it is necessary for me to refer is *Lows* v. *Telford* [2]. There the action was brought for a malicious prosecution. The defendant, who was the mortgagee in fee of certain premises which the plaintiffs had been allowed by the mortgagor to occupy, entered into actual possession of the premises by forcing the lock of the outer door in the absence of the occupiers. The plaintiffs then entered by force and ejected the defendant. The defendant indicted them for a forcible entry, and they were acquitted. They then brought the action against the defendant for a malicious prosecution. It was held by the House of Lords that they could not sustain the action, on the ground that there was reasonable cause for the indictment, because the statute makes a forcible entry equally unlawful whether the person in possession is or is not the lawful owner of the property. I think that none of those cases in any way countervail *Newton* v. *Harland* [3], which I take to have established this, that there is a good cause of action whenever in the course of a forcible entry there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession. I come, therefore, to the conclusion that, in respect of his claim for damages for the forcible entry and eviction, the defendant cannot succeed, but that, in respect of his claim for damages for the injury done to his furniture, which the plaintiff could only justify by a lawful possession, the defendant is entitled to succeed. I shall refer it to Chambers to ascertain the amount of the damages. With regard to the costs, I have already dismissed the rest of the counterclaim, and I am giving the defendant only a very small portion of the relief which he asked. I must either apportion the costs of the counterclaim, or I must give the relief without costs. I think the latter course the preferable one.

[1] 9 C. B. 787.

[2] L. R. 1 App. Cas. 414.

[3] 1 Scott, N. R. 474.

1832. BAXTER *v.* TAYLOR, 4 B. & Ad. 72.

1. A reversioner cannot sue in trespass as he is not in possession, but he can maintain an action on the case for damage to the inheritance of land if he can prove that an actual injury of a permanent nature has been done to his reversionary interest.

2. Adverse acts of user over land, not amounting to such a permanent injury, though done under a claim of right, are not evidence of such right as against a reversioner, as he has no present remedy by which he can obtain redress for such acts.

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Declaration stated that a certain close called Stoney Butts Lane, situate in the parish of Halifax in the county of York, was in the possession and occupation of J. H., J. E., and J. A., as tenants thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; yet the defendant, well knowing the premises, but contriving to prejudice and aggrieve the plaintiff in his reversionary estate and interest, whilst the said close was in the possession of the said J. H., J. E., and J. A., to wit, on, &c., wrongfully and unjustly, and without the leave and licence, and against the will of the plaintiff, put and placed upon the said close divers large quantities of stones, and continued the same for a long space of time, to wit, from thence hitherto; and also with the feet of horses, and the wheels of carriages, spoiled and destroyed divers parts of the said close, whereby the plaintiff was greatly injured in his reversionary estate and interest therein. Plea, not guilty. At the trial before Parke, J., at the last assizes for the county of York, it appeared that the plaintiff was seised in fee of the closes mentioned in the declaration, which he had demised to tenants; that the defendant had with his horses and carts entered upon the close called Stoney Butts Lane; and that after notice had been given him by the plaintiff to discontinue so doing, he claimed to do so in exercise of a right of way. The learned judge was of opinion, that although that might be good ground for an action of trespass by the occupier of the plaintiff's farm, it was not evidence of any injury to the reversionary estate, and therefore that the action was not maintainable; and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

F. Pollock now moved accordingly. Although the plaintiff had demised his land to tenants, yet this action is maintainable for

the injury to the reversion. The defendant claimed a right of way, and persisted in going on the land after notice. The trespass, having been committed for the purpose of asserting a right, was calculated to weaken the evidence of the plaintiff's title. [PARKE, J. —The tenant might have maintained trespass.] The landlord could not compel his tenant to bring the action; and, therefore, unless he has a remedy in this form of action, he has none; and he ought to have some. It is undoubtedly true that he could not maintain this action for a mere trespass, unaccompanied by any permanent injury or any claim of right; but it is different where the act is done to assert a right, and might be evidence of a right of way. [PARKE, J.—Such an act done while the premises were out on lease would not be evidence of any right as against the reversioner.] In *Young* v. *Spencer*[1], which was case by the owner of a house against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises, the facts were, that the lessee did open the door without leave, but the house was not in any respect weakened or injured by it: and it was held that it ought to have been left to the jury to say whether there was not an injury to the plaintiff's reversionary right. And Lord Tenterden, C. J., said, that it seemed to be clearly established, that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner. Here, then, it ought to have been left to the jury, whether the acts done by the defendant under a claim of right were not injurious to the plaintiff's reversionary interest, inasmuch as they were calculated to weaken his evidence of title.

TAUNTON, J.—I think there should be no rule in this case. *Young* v. *Spencer*[1] is not in point. That was an action on the case in the nature of waste by a lessor against his own lessee. Here the action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant, and to an action brought for an injury to the reversion against a stranger. *Jackson* v. *Pesked*[2] shows, that if a plaintiff declare as reversioner for an

[1] 10 B. & C. 145. [2] 1 M. & S. 234.

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injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, and the want of such an allegation is cause for arresting the judgement. If such an allegation must be inserted in a count, it is material, and must be proved. Here the evidence was, that the defendant went with carts over the close in question, and a temporary impression was made on the soil by the horses and wheels; that damage was not of a permanent but of a transient nature; it was not therefore necessarily an injury to the plaintiff's reversionary interest. Then it is said that the act being accompanied with a claim of right, will be evidence of a right as against the plaintiff, in case of dispute hereafter. But acts of that sort could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time, he had no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it; as, therefore, he had no remedy by law for the wrongful acts done by the defendant, the acts done by him or any other stranger would be no evidence of right as against the plaintiff, so long as the land was in possession of a lessee. In *Wood* v. *Veal*[1], it was held that there could not be a dedication of a way to the public by a tenant for ninety-nine years, without consent of the owner of the fee, and that permission by such tenant would not bind the landlord after the term expired. I think therefore that the plaintiff cannot maintain the present action; and there is not doubt sufficient to induce me to think that there ought to be a rule *nisi* for a new trial.

PATTESON and PARKE, JJ., delivered judgement to the same effect.

Rule refused.

NOTE.—For proposition (1) see cases collected in *Mayfair Property Company* v. *Johnston* (1894), 1 Ch. 508. As to (2) see *Bright* v. *Walker* (1834), 1 C. M. & R. 211.—[ED.]

[1] 5 B. & A. 454.

1865. Asher *v.* Whitlock, L. R. 1 Q. B. 1.

One who has obtained peaceable possession of land has a good title against all but the true owner. The fact of such possession is primâ facie evidence of seisin in fee, and confers an interest which is capable of being inherited, devised, or conveyed.

Ejectment for a cottage, garden, and premises, situate at Keysoe Row, in the parish of Keysoe, in the county of Bedford; the writ stated that the female plaintiff claimed possession as heir-at-law of Mary Ann Williamson, an infant deceased.

The defendant defended for the whole.

At the trial before Cockburn, C. J., at the last Bedfordshire Spring Assizes, the following facts appeared in evidence. About Michaelmas, in the year 1842, Thomas Williamson enclosed from the waste of a manor a piece of land by the side of the highway; and in 1850 he enclosed more land adjoining, and built a cottage; the whole being the land as described and claimed in the writ. He occupied the whole till his death in 1860. By his will he devised the whole property, describing it as 'a cottage and garden, in Keysoe Row, in which I now dwell,' to his wife Lucy Williamson, for and during so much only of her natural life as she might remain his widow and unmarried; and from and after her decease, or second marriage, whichever event might first happen, to his only child Mary Ann Williamson, in fee. After the death of Thomas Williamson, his widow remained in possession with the daughter, and in April, 1861, married the defendant; and from that time they all three resided on the property till the death of the daughter, aged eighteen years, in February, 1863. On her death, the defendant and his wife, the widow of the testator, continued to reside on the premises; the widow died in May, 1863, and the defendant still continued to occupy.

The female plaintiff is the heir-at-law of the testator's daughter Mary Ann Williamson. The writ was issued April 11, 1865.

These facts being undisputed, the chief justice directed a verdict for the plaintiff for the whole of the property claimed; with leave to move to enter the verdict for the defendant, on the ground that the testator had no devisable interest in any part of the property.

A rule *nisi* was afterwards obtained to enter the verdict for the

1865. defendant, on the ground that no title in the plaintiffs was shown to either portion of the land enclosed.

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Markby (November 2) showed cause. The testator, at the time of his death, had acquired no title by lapse of time; and the point made and reserved at the trial was, that the testator being only a trespasser in possession, had no devisable interest; that his interest was at most that of a tenant at will only; and that the devisee, if in possession, was only a new trespasser. But the authorities are conclusive to show that a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised, or conveyed. In *Doe* v. *Jauncey* [1], which was also the case of an enclosure from the road-side, a somewhat similar objection was taken; but Coleridge, J., said: 'The moment the father had taken the land, if he died, it would (provided the owner did not interfere) descend to his son.' In *Doe* v. *Barnard* [2], a distinction is clearly drawn by the Court between persons who succeed each other in possession, claiming one from the other by descent, devise, or conveyance, and persons who succeed each other in possession, there being no such relation between them. The same doctrine is recognized in *Doe* v. *Birchmore* [3]. Moreover, in this case, the plaintiff was not bound to show any title at all as against the defendant. The defendant must be taken on the facts to have entered by the daughter's permission, whose title, therefore, he cannot dispute. So neither can he dispute the title of the female plaintiff, the daughter's heir-at-law. *Doe* v. *Birchmore* [3] is a direct authority on this point. There the defendant had come in as the servant of the testator, who was himself only tenant at will; and in ejectment brought by the devisee against the defendant, who remained in possession after the death of the testator, the Court held that the defendant, the servant, could not compel the devisee to prove that the testator had title; and that it was sufficient to show that the defendant came in under the testator.

Merewether (November 2 and 3), in support of the rule. As to the point last made, the defendant did not come in under the plaintiff's title, that is under the will, but adversely to it; for at

[1] 8 C. & P. 99, 102.
[2] 13 Q. B. 945, 952; 18 L. J. (Q. B.) 306.
[3] 9 Ad. & E. 662, 667.

the very moment of the marriage, the estate of the widow ceased; and the defendant entered as a wrongdoer.

[COCKBURN, C. J.—The widow had rightful possession, which became wrongful on her marriage; but she had the same actual possession. She, therefore, coming in under the will, cannot dispute title claimed under it, and by means of the marriage her possession became that of the defendant; if she cannot dispute the validity of the will, neither can he.]

When the defendant entered, the wife being already married had ceased to hold under the will.

[MELLOR, J.—The defendant's contention is, that the woman being a free agent, could throw up her estate, and that the defendant, coming in after the marriage, came in as a wrongdoer. COCKBURN, C. J.—The widow, after her second marriage, would not be a wrongdoer in the sense of a trespasser.]

The defendant cannot be said to come in under the will, for he entered and took possession in spite of the will.

[COCKBURN, C. J.—Why are we to assume his possession was in spite of the will? he goes into the cottage, and lives with the mother and daughter, who claim under the will.]

Secondly, assuming the defendant's possession to be adverse to the will, the case is that of two trespassers, and in such a case, the one last in possession is entitled to keep the land until the person having title ejects him; and the devise of the first confers no title on his devisee, so as to enable her or her heir to maintain ejectment against the present possessor.

[COCKBURN, C. J.—Under the old law, a disseisor had good title against all but the disseisee; and if the disseisor died before entry by the disseisee, the latter's entry was tolled, and he was driven to his real action.]

This is not the case of a disseisor. In *Doe* v. *Barnard*[1], a prior possession being shown, the plaintiff, who had only a title from mere possession for less than twenty years, was held incapable of maintaining her action of ejectment. In such a case, any one getting possession, without force or fraud, can maintain his possession. In *Dixon* v. *Gayfere*[2], where there had been several successive and independent occupiers, all without title, and the possession ultimately came to the Court, the Master of the Rolls decreed

[1] 13 Q. B. 945; 18 L. J. (Q. B.) 306. [2] 17 Beav. 421.

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possession to the *last* occupier, expressly on the ground that at law he could have maintained his possession against all but the true owner, who in that case was barred by lapse of time.

[COCKBURN, C. J.—The Master of the Rolls may be right in equity, but I doubt his being right in law. In *Doe* v. *Dyeball*[1], Lord Tenterden held, that possession for one year by the plaintiff was sufficient to maintain ejectment against a person who came and turned him out, without any further proof of title.]

In that case the possession of the defendant was obtained by force. Here it was simply adverse.

[COCKBURN, C. J.—A person being peaceably in possession of a house, a person, going in and taking possession without his leave, commits a trespass, and all trespass implies force in the eye of the law.]

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The defendant, on the facts, is in this dilemma: either his possession was adverse, or it was not. If it was not adverse to the devisee of the person who enclosed the land, and it may be treated as a continuance of the possession which the widow had and ought to have given up, on her marriage with the defendant, then, as she and the defendant came in under the will, both would be estopped from denying the title of the devisee and her heir-at-law. But assuming the defendant's possession to have been adverse, we have then to consider how far it operated to destroy the right of the devisee and her heir-at-law. Mr. Merewether was obliged to contend that possession acquired, as this was, against a rightful owner, would not be sufficient to keep out every other person but the rightful owner. But I take it as clearly established, that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine. In *Doe* v. *Dyeball*[1] one year's possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally enclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, 'You have no more

[1] Mood. & M. 346.

title than I have, my possession is as good as yours,' surely ejectment could have been maintained by the original possessor against the defendant. All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee. It is too clear to admit of doubt, that if the devisor had been turned out of possession he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner. Here the widow was a prior devisee, but *durante viduitate* only, and as soon as the testator died, the estate became vested in the widow; and immediately on the widow's marriage the daughter had a right to possession; the defendant however anticipates her, and with the widow takes possession. But just as he had no right to interfere with the testator, so he had no right against the daughter, and had she lived she could have brought ejectment; although she died without asserting her right, the same right belongs to her heir. Therefore I think the action can be maintained, inasmuch as the defendant had not acquired any title by length of possession. The devisor might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff. We know to what extent encroachments on waste lands have taken place; and if the lord has acquiesced and does not interfere, can it be at the mere will of any stranger to disturb the person in possession? I do not know what equity may say to the rights of different claimants who have come in at different times without title; but at law, I think the right of the original possessor is clear. On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed, and that the rule should be discharged.

MELLOR, J.—I am of the same opinion. It is necessary to distinguish between the case of the true owner and that of a person having no title. The fact of possession is primâ facie evidence of seisin in fee. The law gives credit to possession unless explained; and Mr. Merewether, in order to succeed, ought to have gone on and shown the testator's title to be bad, as that he was only tenant at will, but this he did not do. In *Doe* v. *Dyeball*[1] possession for

[1] Mood. & M. 346.

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a year only was held sufficient against a person having no title. In *Doe v. Barnard*[1] the plaintiff did not rely on her own possession merely, but showed a prior possession in her husband, with whom she was unconnected in point of title. Here the first possessor is connected in title with the plaintiffs; for there can be no doubt that the testator's interest was devisable. In the common case of proving a claim to landed estate under a will, proof of the will and of possession or receipt of rents by the testator is always primâ facie sufficient, without going on to show possession for more than twenty years. I agree with the Lord Chief Justice in the importance of maintaining that possession is good against all but the rightful owner.

LUSH, J., concurred.

Rule discharged.

NOTE.—This case is inserted as the only modern case upon the subject, and as such quoted as an authority in the textbooks, but it cannot be accepted without comment. The actual decision in the case upon the facts proved at the trial is undoubtedly a right one, inasmuch as it is clear that the possession of the defendant was not adverse to the plaintiff or to his predecessor in title, Mary Ann Williamson. Mary Ann Williamson at the date of her death was a minor living with her mother; and from the moment that the mother's life interest expired, upon her remarriage, the mother and her husband who came in in her right would be considered as holding the property as bailiffs for the infant daughter: *Thomas* v. *Thomas*, 2 K. & J. 83, and many other cases. It is like the case of a trustee holding on behalf of his *cestui que trustent*. The case, however, so far as regards the general propositions as to the law of ejectment which it seems to enunciate, must be only accepted with serious limitations. If it is intended by the decision to lay down as a general proposition that the mere fact of a person having once been in the possession of land gives him even a primâ facie right in all cases to eject a subsequent possessor who does not show title, this proposition is certainly not the law. The most accurate expression of the law upon the subject is to be found in Cole on *Ejectment*, a work of great authority, which was consulted in every action of ejectment from 1852 to the time of the Judicature Acts. From that work the following propositions are extracted:—

1. The modern action of ejectment is brought to establish a *right of entry* upon land, &c.

2. A right of entry means a *legal right to enter and take actual possession of land*, &c., as incident to some estate or interest therein not barred or extinguished by the Statutes of Limitation: Cole, edition 1857, p. 66.

[1] 13 Q. B. 945; 18 L. J. (Q. B.) 306.

3. Proof of mere possession by the plaintiff or of the person through whom he claims within twenty years before action is not generally sufficient to support an ejectment, because the defendants in such action are sued as *tenants in possession*, and their possession is presumed to be lawful in the absence of proof of title in the claimants. '*Possessio contra omnes valet praeter eum cui jus sit possessionis*': Lofft, *Maxims*, No. 265. 'The plaintiff cannot recover but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title; for possession gives the defendant a good title against every man who cannot show a good title': per Lord Mansfield, C. J., in *Roe d. Haldane* v. *Harvey*, 4 Bur. 2487 (ibid. p. 212).

4. Proof of possession for twenty years and upwards is sufficient primâ facie evidence of a seisin in fee even in an action of ejectment: *Doe d. Harding* v. *Cooke*, 7 Bing. 346. And this is so especially since 3 & 4 Will. IV, c. 27, whereby any outstanding right of entry is *extinguished* when the period of twenty years limited by that Act is determined (ibid. p. 212).

5. If the defendant be shown to be a *mere wrongdoer*, proof of prior possession and of the wrongful act of the defendant whereby the plaintiff was deprived of possession is sufficient primâ facie evidence of title: *Doe d. Hughes* v. *Dyeball*, 3 C. & P. 610 (ibid. p. 213). On this point also see per Bramwell, B., in *Davison* v. *Gent*, *infra*, and this is the *ratio decidendi* in that case upon this point.

Since the Real Property Limitation Act 1874, the period of twenty years above mentioned would have to be altered to twelve years; but otherwise it is submitted that the above paragraphs are an exact statement of the law. The only cases which seem to conflict with this statement are *Allen* v. *Rivington*, 2 Wms. Saunders, 111, and *Doe d. Smith* v. *Webber*, 1 A. & E. 119. The first of these cases is not regarded as law by Serjt. Williams, and indeed it is so scantily reported as to be barely intelligible. In the second the point was never really argued. The only question decided was as to the admissibility of a certain award in evidence.

Upon principle it would seem that the law as laid down by Cole must be correct. An action of ejectment is *ex hypothesi* brought against a person who is in possession of the land, and therefore primâ facie seised of it. This of course is merely a legal presumption liable to be rebutted. But if the plaintiff comes into court and only proves that he once was also in possession of the land before the defendant, and *nothing more*, he only sets up a presumption against a presumption, and as the onus is upon him to prove his case he must fail. If, on the other hand, he goes further than mere proof of prior possession, and establishes that while he was peaceably in possession the defendant came and ousted him, upon proof of that additional fact he is entitled to succeed if the defendant does not show title. For the defendant's possession in that case is a possession obtained *vi*, and it could never be permitted that a person by merely doing a tortious act and forcibly ejecting another who is peaceably in possession should be allowed to improve his position at the expense of the person whom he has wronged, and shift the onus of proof from himself to the previous possessor: cp. *Browne* v. *Dawson*,

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12 A. and E. 624 and *supra*. In fact such an action rather resembles an action of trespass than an action of ejectment. There is a further consideration which strengthens the view taken by Cole. It was held in *Doe d. Harding* v. *Cook* (v. s.) that twenty years' prior possession was sufficient to support an action of ejectment even before the Act 3 & 4 Will. IV, c. 27. The period of twenty years was probably taken either from the earlier Statute of James I or by analogy from the period of user which the judges held sufficient to enable a jury to infer the loss of a grant. Now it would be an obvious absurdity for the courts to go to the trouble of laying down a rule that twenty years' possession would suffice for ejectment if at that very time any period of prior possession would suffice.

There is a suggestion in the principal case that there is some distinction in this respect between the possession of a disseisor and that of other people. What exactly a disseisin was was not really understood even in the time of Lord Mansfield: see his celebrated judgement in *Taylor d. Atkins* v. *Horde*, 2 Smith's Leading Cases. The possession of a disseisor, however, was one of several forms of possession known to the old law which eventually ripened into ownership. To this extent no doubt it was a superior kind of possession to one which was not adverse to the true owner in the old strict sense of the word, and therefore could never ripen into ownership. The disseisor no doubt had a tortious freehold interest in the land upon which he had entered, probably a survival of feudal tenure, but that interest was merely an incident of his possession. If he abandoned possession before he had acquired a title under the Statutes of Limitation he no longer had any interest whatever. The interest of the true owner, if the possession were left vacant, would revive: see *Trustees, &c., Company* v. *Short*, L. R. 13 A. C. 793. The same principle applies to property in goods: *Buckley* v. *Gross* (1863), 3 B. & S. 586; 32 L. J. (Q. B.) 129. When, therefore, it is said, as in the principal case, that a disseisor had a good title *against all but the disseisee* it only means that so long as he is in possession he can defend his possession against any one but the disseisee; not that he can bring ejectment against any one unless he is forcibly ousted; but that if he is a defendant in an ejectment action he will be entitled to succeed against any one but the disseisee.

Since the Act 3 & 4 Will. IV, c. 27 the old distinction between possession which was and possession which was not adverse in the technical sense has disappeared, and it is submitted that since that date all possession which eventually ripens into ownership under that Act is on an equal footing in the eye of the law: *Nepean* v. *Doe*, 2 M. & W. 894.

It will be borne in mind in considering cases on the law of ejectment that the parties in an action of ejectment are very often skirmishing with the view of making each other disclose their title. There is nothing that a landowner is more averse to than publicly producing his title-deeds and disclosing possible flaws therein. Hence the great importance of the fact of possession because, peaceable possession being regarded as primâ facie evidence of ownership, it casts upon the person who wishes to disturb that possession the onus of proving his title.

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In brief, as a general principle the old rule is probably accurate that mere possession is sufficient to enable you to maintain an action of trespass, but that proof of title is necessary to enable you to maintain an action of ejectment: see per Patteson, J., in *Doe d. Carter* v. *Barnard*, 13 Q. B. at p. 953. In other words, the law as to the possession of land is in this respect almost exactly analogous to the law as to the possession of goods: see *Armory* v. *Delamirie* and other cases *infra*.—[ED.]

1857. DAVISON *v.* GENT, 26 L. J. (Ex.) 122; 1 H. & N. 744; 3 Jur. (N. S.) 342.

Possession of land confers a title sufficient to maintain ejectment against a mere wrongdoer, and the latter cannot set up a *jus tertii*.

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DAVISON v. GENT.

This was an action of ejectment brought by John Davison, Arthur Coates and Elizabeth his wife.

The land in question was land of which the Dean and Chapter of Durham were seised; and it appeared at the trial, before Bramwell, B., at the last Summer Assizes for Durham, that the Dean and Chapter had leased to one Wood, in 1835, for twenty-one years. It also appeared that it was their custom to renew their leases every seven years, and that Wood's lease had been, in fact, renewed in 1842 and in 1848, the lease in 1848 being for twenty-one years from November 5, 1848. It further appeared that Wood had been in possession for some years, and had let the land to two tenants in succession, who had paid rent to him. He died in June, 1853, leaving his widow and another person, who renounced and disclaimed, executors and trustees. The widow renewed the lease in 1856, taking two leases (each comprising a portion of the premises) to herself for twenty-one years. She afterwards married Coates, one of the co-plaintiffs, and they subsequently contracted to assign their interest in the land to Davison, the other co-plaintiff. They had previously let the land to one Robinson, who went out at Christmas, and this contract was in February; but the assignment was to take effect from Christmas. The defendant then took possession of a house and garden, part of the premises. The plaintiff Davison put cattle in a field, also portion of the premises. The cattle were driven off by the defendant, and then put on again by Davison, who desisted only under a

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threat of personal violence, and then brought this action to recover possession. It was shown, on the part of the defendant, that, in 1842, a lease of the premises had been granted to one Sherwood by the Dean and Chapter; but it appeared that when they renewed a lease, they always had the old lease given up and the seal torn off, keeping the original; and the chapter officer produced the counterpart of the lease of 1842, which was given up by Wood upon the renewal in 1848, and of which the seal had been torn off. Wood having produced the original lease granted to Sherwood, and the original being cancelled. It was contended that there was evidence of a surrender of Sherwood's lease, in fact or in law, which was denied on the part of the defendant. The verdict passed for the plaintiffs, but the point was reserved; a rule was obtained to set aside the verdict, on the ground that there was no evidence to justify the jury in finding that the lease to Sherwood had been surrendered in point of *fact*, and that the evidence did not show a surrender in point of *law*.

Hugh Hill and J. Addison now showed cause.—The plaintiffs were entitled to recover either on their title or their prior possession as against a wrongdoer. Secondly, the plaintiffs can recover, apart from title by reason of their prior possession, as against a wrongdoer.

[BRAMWELL, B.—No doubt, if there has been a forcible ouster.]

There was so here; for the cattle of Davison were turned out after he was legally in possession; and, before the defendant's entry, the plaintiffs were as much in possession as they could be of a field.

[BRAMWELL, B.—You would say that either Robinson, the former tenant, gave up possession to the plaintiffs or to the defendant; if to the defendant, he is in the same position as Robinson, and cannot dispute the plaintiffs' title[1]; if to the plaintiffs, then the defendant is a mere wrongdoer.]

Exactly so. The defendant was either a trespasser, or he held under the plaintiffs. In either case they are entitled to recover as against him upon their bare possession.

[1] See *Doe d. Manton* v. *Austin*, 2 M. & S. 107; s. c. 1 L. J. (C. P.) 152; *Doe d. Johnson* v. *Baytup*, 3 Ad. & E. 188; s. c. 4 L. J. (Q. B.) 263; and *Cooper* v. *Blandy*, 4 M. & S. 562; s. c. 3 L. J. (Exch.) 274—the latter, in its circumstances, very much resembling the case at the bar.

Manisty, for the defendant, in support of the rule.—As to the second point, that the plaintiffs can recover on their prior possession against a wrongdoer, that principle does not apply where, as in the present case, the plaintiff has sought to recover upon his title, and has failed. For then it appears that the defendant was no more a wrongdoer than the plaintiff; and there was no evidence of actual ouster.

POLLOCK, C. B.—Upon the second point, as to the plaintiffs' prior possession being sufficient title as against a wrongdoer, I cannot assent to the notion that where a party has a right to maintain an action of ejectment by reason of his possession, if he attempts also to show title, and discloses a flaw in his title, he cannot recover by reason of his possession. He may say, 'I claim to recover, both by reason of my title and my possession; and, failing in one, I will rely upon the other.' Upon both points, I think the plaintiffs are entitled to recover.

BRAMWELL, B.—Most certainly, on the second point, the plaintiffs are entitled to recover. The defendant either took a tortious possession of the premises as a mere intruder and trespasser on the plaintiffs; or, if he had any lawful possession, it must have been derived from and in privity with Robinson, the former tenant. It is said, that the true title was shown, and that it was not in them. But even if this were so, it is not as though the plaintiffs had shown that they were wrongfully in possession; but merely that they did not show that they were rightfully in possession under a particular title. The plaintiff in such a case says, 'I am in possession, and I will show you that I am lawfully in possession.' If he fails in proving that he was lawfully in possession, he does not show that he was wrongfully in possession, even although he raises a presumption in favour of some other person. So in the present case. It may be, that the plaintiffs have no right as against Sherwood, and that Sherwood might have a title as against them. But Sherwood is not a party to the suit. The party who has turned the plaintiffs out of possession is sued. The plaintiffs only fail to show that they have a title under a particular person. It is not for the defendant then to ask it to be presumed that he has any title or right to recover. It is for him to prove that he has title or right to recover. It is for him to prove that he has title,

1857.

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Bramwell, B.

in answer to the plaintiffs' proof of a prior possession. I am therefore clearly of opinion that the plaintiffs are entitled to recover. [Defendant's counsel argues that although a defendant makes no title by possession, still if the plaintiff attempts to show a true title in himself and fails in showing one he cannot recover. Now the fallacy of that reasoning is this—the plaintiff showing that he was lawfully in possession might not be sufficient against *every* wrongdoer, and he therefore has a right to say 'I will show two titles in myself, first a primâ facie title by possession, and secondly that that primâ facie title is a good one,' and he may fail in showing the latter, for it may appear that the real title is in a third party against whom his possession would not avail. But when the man who wrongfully turned him out sets that up as a defence, the plaintiff's answer is 'My possession is good against you, for you have not shown that I was tortiously there although perhaps another person would have a good title as against me. Besides, it may be that I have a good title under him, at least as against you, and it is not for you to set up his title as against me[1].']

WATSON, B., concurred.

Rule discharged.

NOTE.—There has been a great apparent conflict of authority upon this point, but it is submitted that the correct rule of law is: (1) That whereas one who is in peaceable possession of land can in defence of that possession avail himself of any flaw which he can point out in the plaintiff's title or may set up a *jus tertii*: see *Roe d. Haldane* v. *Harvey*, 4 Burr. 2484, and per Mellor, J., in *Asher* v. *Whitlock*, *supra*: (2) on the other hand the possession of a mere wrongdoer is not regarded as a legal possession at all as against the party ousted; and the latter, on proof of the facts of possession and ouster, can succeed in ejectment against the intruder: see last note; and therefore, as the plaintiff's real title does not come in issue at all, the defendant cannot be allowed to impugn it. For a man cannot by forcibly ejecting another invert the onus of proof.

As against this view two cases are mainly relied upon: *Doe d. Carter* v. *Barnard* (1849)[2], and *Nagle* v. *Shea* (1874)[3]. In the first case the plaintiff in ejectment, in the course of proving her own possession, incidentally proved the prior possession of her husband; which showed that the title was in his heir-at-law and not in her. It was held that the defendant, although apparently a forcible ejector, was entitled, in answer to her claim,

[1] The words in brackets are taken from the report in 3 Jur. (N. S.) 342.
[2] 13 Q. B. 945; 13 Jur. 915.
[3] 8 Ir. Rep. C. L. 224 and 9 Ir. Rep. C. L. 389 (Ex. Ch.).

to rely on this flaw in the plaintiff's title proved by herself. In this case, however, the point raised in the principal case of the distinction between peaceable and forcible possession does not seem to have been referred to. It may be that there is a distinction between permitting a defendant who is a wrongdoer to set up a *ius tertii* on his own account, and merely allowing him to take advantage of such a flaw if incidentally established by the plaintiff himself. This would also explain the case of *Doe d. Crisp* v. *Barber*[1]. If not, these cases are in direct conflict with the principal case, and it is submitted that the reasoning of the latter case should prevail. As to the case of *Nagle* v. *Shea*: it will be seen from the report of the case in the Court of Exchequer Chamber (which seems to have escaped attention) that the only point really decided, and open to the plaintiff on appeal, was as to whether the existence and contents of a will had been duly proved. Upon the point which was discussed in the lower Court, viz. whether a defendant, who is a mere wrongdoer, can force a plaintiff whom he has ousted to show title other than possession at the date of the ouster—and thus incidentally be enabled to set up *ius tertii*—the Court of Exchequer Chamber gave no decision, but it is evident from remarks contained in the judgements that had they given a decision on the point it would have been against the defendant. This case, therefore, can hardly be treated as a decision either way.

On the other hand it seems that the American authorities support the view above set out: see Greenleaf on *Evidence*, fifteenth edition, s. 331; Newell on *Ejectment* (1892), p. 434, s. 15.

The view expressed in this and the preceding note that the real explanation which lies at the root of these cases is that possession obtained by force or fraud, not acquiesced in, is not regarded as legal possession at all as against the party dispossessed, is further reinforced by the fact that the latter can bring an action of trespass *q. cl. f.* against the intruder: see *Browne* v. *Dawson*, *supra*—a form of action which requires the plaintiff to be in possession at the time of action brought.—[ED.]

[1] 2 T. R. 749.

TRESPASS TO GOODS AND CONVERSION.

1796. GORDON *v.* HARPER, 7 T. R. 9.

In order to maintain trover the plaintiff must have both a right of property in the chattel and a right to the immediate possession. A reversioner therefore cannot sue in trover; neither can he sue in trespass, as he is not in possession.

1796.

GORDON v. HARPER.

IN trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.—On October 1, 1795, and from thence until the seizing of the goods by the defendant, as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture to the plaintiff, under an agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not expired. The goods in question were on October 24 taken in execution by the defendant, then sheriff of the county of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgement at the suit of J. Broomhead and others, executors of J. Broomhead deceased, against one Borret, to whom the goods in question had belonged, but which goods, previous to the agreement between the plaintiff and Mr. Biscoe, had been sold by Borret to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action *of trover*.

LORD KENYON, C. J.—The only point for the consideration of the Court in the case of *Ward* v. *Macauley*[1] was, whether in a case like the present the landlord could maintain an action of *trespass* against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that trover was the proper remedy, was an extrajudicial opinion, to which upon further consideration I cannot subscribe. The true question is, whether when a person has leased goods in

[1] 4 T. R. 489.

1796.

GORDON v. HARPER. — Lord Kenyon, C. J.

a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can notwithstanding recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term: the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply: the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and by the very act of felling it his right is absolutely determined; and even then the property does not vest in his immediate landlord; for if he has only an estate for life, it will go over to the owner of the inheritance. Here however the tenant's right of possession during the term cannot be devested by any wrongful act, nor can it thereby be revested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do: but it is clear that he cannot maintain trover.

ASHHURST, J.—I have always understood the rule of law to be, that in order to maintain trover the plaintiff must have a right of property in the thing, and a right of possession, and that unless both these rights concur the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises: but supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term.

1796.

GORDON v. HARPER.

GROSE and LAWRENCE, JJ., delivered judgement to the same effect.

Postea to the defendant.

NOTE.—In *Mears* v. *The London and South-Western Railway Company* (1862)[1], it was held that a reversioner may bring an action on the case for any permanent injury to chattels of which he is the owner.

It may be noted that for practical purposes a right of property in a chattel sufficient to maintain trover is sufficiently evidenced by proving either the right to the immediate possession of the chattel, i. e. title or the fact that the chattel was in the actual possession of the plaintiff (e. g. as bailee) at the time of the conversion: see the next case, and the notes to *Jeffries* v. *Great Western Railway Company*, and *Fouldes* v. *Willoughby*, *infra*.—[ED.]

8 Geo. I. ARMORY *v.* DELAMIRIE, 1 Stra. 505; cor. Pratt, C. J.

The finder of a chattel has a sufficient property therein to maintain trover against a wrongdoer.

Omnia presumuntur contra spoliatorem.

8 Geo. I.

ARMORY v. DELAMIRIE.

The plaintiff, being a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it took out the stones, and calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in *trover* against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action will lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the

[1] 11 C. B. (N. S.) 850; 31 L. J. (C. P.) 220.

jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

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NOTE.—It is important to notice the limited application of this case. As against the rightful owner the mere finder has not only no right to retain possession of the thing found, but may even be convicted of larceny of it under certain circumstances. Thus in *Merry* v. *Green* (1841)[1] a man purchased a bureau which contained in a secret drawer a purse and money. This was unknown to either vendor or purchaser, though the articles would appear to have been the property of the vendor. The Court held that the purchaser was in no better position than a mere finder, and would be guilty of larceny if, upon discovery of the property, being aware that the true owner could be found, he converted it to his own use; unless he had bought, or thought he was buying, the bureau together with its contents.

The statement in the judgement in this case that—though there was a delivery of the bureau, and a lawful property therein thereby vested in the purchaser—there was no delivery so as to give a lawful possession of the 'purse and money' must, it would seem, mean that he has no lawful possession as against the true owner (and it was with the purchaser's right as against him that the Court was alone concerned), for doubtless the purchaser could have maintained trespass against any one who had disturbed his possession otherwise than under the authority of the true owner.

In cases where chattels are included in or lying upon land, it would seem that possession of the land carries with it a lawful possession of such chattels as against all but the true owner, even although their existence may be unknown. The finder of them then must give them up to the possessor of the land: *Elwes* v. *Brigg Gas Company* (1886)[2]; *South Staffordshire Water Company* v. *Sharman* (1896)[3]. The case of *Bridges* v. *Hawkesworth* (1851)[4] confirms rather than conflicts with this view: for the bank-notes in that case, being found in a public part of the shop, were treated as if they had been picked up in a public street: see *M'Avoy* v. *Medina* (1866)[5]. It is submitted that the possessor of a chattel has, upon the analogy of the case of land, a possession of its contents, though their existence may be unknown, and that he can maintain trespass or trover with respect to them against any person other than the true owner or those claiming through him. Thus if A, the true owner of a bureau and its contents, unwittingly delivers both under a contract of sale to B, not intending to part with more than the bureau, and B similarly delivers them to C, and D finds and takes the contents, C as being possessor could maintain trespass or trover against D, and A as true owner entitled to the immediate possession could maintain trover and probably trespass (see Br. Abr. 288, pl. 303) against D; but B,

[1] 7 M. & W. 623. [2] 33 Ch. D. 562. [3] 1896. 2 Q. B. 44.
[4] 21 L. J. (Q. B.) 75. [5] 11 Allen, 548.

8 Geo. I.

ARMORY v. DELAMIRIE.

having parted with such rights as he had, would have neither the possession, nor the right to possession, sufficient to support trespass or trover. The American case of *Durfee* v. *Jones* (1877)[1] would seem not to be correctly decided, as there the defendant found and took the property out of a safe of the plaintiff's of which he was bailee at will on behalf of the plaintiff, and was nevertheless held entitled to retain possession of it as against him.—[ED.]

1841. FOULDES *v.* WILLOUGHBY, 8 M. & W. 540.

A simple asportation of a chattel or interference with it, however slight, may be sufficient foundation for an action of trespass; but to amount to a conversion the act done must be inconsistent with the general right of dominion of the owner.

1841.

FOULDES v. WILLOUGHBY.

Trover for divers, to wit, two horses.—Plea, not guilty.

The cause was tried before Maule, J., at the last Spring Assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steam-boats over the River Mersey, from Birkenhead to Liverpool, and that on October 15, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steam-boat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing-slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of an hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steam-boat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their

[1] 11 Rhode, I. 588.

keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steam-boat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter Term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages.

ALDERSON, B.—It would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled

1841.

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Alderson, B.

to make of it; and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go, if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick* v. *Blanchard*[1], that 'In order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting.' This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury, to say, whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, i. e. with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

LORD ABINGER, C. B., and GURNEY and ROLFE, BB., delivered judgement to the same effect—and *the Rule was made absolute.*

NOTE.—A further distinction between the actions of trover and trespass is well pointed out by Patteson, J., in *Balme* v. *Hutton* (1833)[2], which was an action of trover by the assignees of a bankrupt in respect of a conversion

[1] 6 T. R. 299. [2] 9 Bing. at p. 477.

1841.

FOULDES v. WILLOUGHBY.

by a sheriff of the bankrupt's goods in the interval between the act of bankruptcy and the issue of the commission appointing the assignees. The latter obtained under the commission a title to the bankrupt's goods, which related back to the date of the act of bankruptcy, and was paramount to the title of the sheriff. This made the act of the sheriff in seizing the bankrupt's goods a conversion *ex post facto*. The assignees could not have maintained trespass as they were not in possession and no immediate right of possession at the date of the seizure of the goods by the sheriff; but it was held that they were entitled to maintain trover, Patteson, J., saying: 'Now the action of trover, which is the form of the present action, is founded on property, and, as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action. . . . The action of trespass is very different. It is founded not on property, but on possession; and where there is no actual possession, but right of property is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass. Here he had no such right, except by relation, and the cases establish that a man shall not be made a trespasser by relation. There is reason in such a rule, for in trespass the damages are unlimited: in trover they are limited to the value of the property.'

The last distinction pointed out by the learned judge is still of practical importance.

The statement that 'a man shall not be made a trespasser by relation' is accurate in this sense—that an act which was innocent when committed cannot be converted into a trespass by the doctrine of relation; but where the act is a trespass at the time of its commission one who has only acquired by operation of law a right to possession, *ex post facto*, may sue in trespass by virtue of the doctrine of relation, as e.g. an executor may bring an action for trespass in respect of an act committed between the date of the death of the testator and the probate of the will: see *Tharpe* v. *Stallwood* (1843)[1].—[ED.]

1875. HOLLINS *v.* FOWLER, L. R. 7 H. L. 757.

Where one innocently takes a part in transferring or disposing of the property in goods to which the vendor has no title he is guilty of a conversion, and his ignorance of the rights of the true owner is no defence. But where he merely acts as an intermediary, and does not in any way himself deal or interfere with the property in the goods he is not liable.

1875.

HOLLINS v. FOWLER.

This was an appeal on a case stated, on which the Court of Queen's Bench had given judgement for Fowlers, the plaintiffs in

[1] 5 M. & G. 760.

1875.

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the action, which judgement had been affirmed in the Exchequer Chamber [1].

Fowler & Co. were merchants at Liverpool. Hollins & Co. carried on the business of cotton brokers there.

In December, 1869, Fowler & Co. instructed their brokers, Messrs. Rew, to sell for them thirteen bales of cotton. A person named Hill, a clerk to H. K. Bayley, a cotton broker at Liverpool, proposed a purchase on his master's account. Messrs. Rew refused to sell unless the name of a responsible person was given as the purchaser. Hill then said that Bayley was buying as broker for Thomas Seddon, of Bolton. The inquiries as to Mr. Seddon being quite satisfactory, Messrs. Rew forwarded to Fowlers, their principals, a sold note, in these terms:—'Liverpool, December 18, 1869. Messrs. Fowler Brothers. We have this day sold on your account the undermentioned cotton.' Then came the description, 'Thirteen bales—American—at 12*d.* per Minnesota,' and the buyer's name was given thus: 'Thomas Seddon, per H. K. Bayley.' The payment was to be 'cash within ten days, less 1½ per cent. discount.' A counterpart of this note was sent to Bayley himself. On the same day Bayley sent to Messrs. Rew a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs. Rew sent to Bayley the following note: 'Mr. Thomas Seddon, per Messrs. H. K. Bayley & Co. Bought from Fowler Brothers, per Rew & Freeman, brokers, 13 bales American cotton, ex Minnesota, at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash, within ten days, less 1½ per cent. discount.'

On December 23, H. K. Bayley, being thus in possession of the cotton, offered the same to Francis Hollins (one of the defendants), who consented to purchase the thirteen bales at 11½*d.* per pound, and who purchased at the same time twenty-five other bales of cotton from H. K. Bayley on the same terms. Messrs. Hollins, under the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs. Micholls, cotton spinners at Stockport (for whom they were in the habit of purchasing cotton), stating that on that day Mr. Micholls would be in Liverpool to purchase cotton through the Messrs. Hollins, and those gentlemen had bought the cotton from

[1] L. R. 7 Q. B. 616.

H. K. Bayley believing it to be of the sort which Messrs. Micholls would require. On examining the cotton, Mr. Micholls agreed to take it. Messrs. Hollins were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take to the cotton thus speculatively purchased for him, Messrs. Hollins disposed of it to some other customer. In the latter part of December 23, Bayley received a delivery order in these terms:—'Please deliver the bearer . . . cotton, ex Minnesota, at 11¾*d.* per lb., bought this day for Micholls & Co. Francis Hollins & Co.' The thirteen bales were delivered on the following morning to Messrs. Hollins, by whom they were at once forwarded to Micholls & Co., at Stockport. Bayley received the price of the cotton from Hollins & Co., which was repaid by Micholls & Co., together with a sum for commission and porterage; the defendants, Messrs. Hollins, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

Messrs. Fowler, not having received payment for the cotton at the stipulated time (ten days), applied to Mr. Seddon, and then learnt that he had never employed H. K. Bayley to purchase cotton for him. Application was then made to Messrs. Hollins for the bales of cotton, when the answer given was, 'the cotton was bought by one of our spinners, Messrs. Micholls & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your client any assistance.' The action for trover was afterwards brought.

The cause was heard before Mr. Justice Willes, at the Liverpool Spring Assizes, 1870, when the facts above stated having been proved, the learned judge left two questions to the jury: first, whether the thirteen bales in question had been bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr. Justice Willes then directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on November 25, 1870, was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion, and so the judgement of the Court below stood affirmed.

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This appeal was then brought.

The judges were summoned, and Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Brett, Mr. Baron Cleasby, Mr. Justice Grove, and Mr. Baron Amphlett, attended.

The LORD CHANCELLOR proposed the following question to the judges:—Whether, under the circumstances stated in the joint case on appeal, the respondents (the plaintiffs in the action) were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration?

BLACKBURN, J.—My Lords, it appears from the statement in the case that Fowlers, the plaintiffs, had delivered into the actual custody of Bayley, a broker, thirteen bales of cotton, their property, they believing that they had sold these bales to Seddon, through Bayley, as Seddon's broker, after they had refused to trust Bayley himself; and believing that Bayley was the agent of Seddon to receive delivery; so that Fowlers thought that they were transferring the property to Seddon, but were mistaken, as in fact Bayley had no authority from Seddon either to purchase or to take delivery. Under such circumstances the property and legal right to the possession remained in Fowlers, and Bayley could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Acts, because he was not entrusted by the plaintiffs as their agents; nor could he do it as being a person in whom the property had vested, subject to being divested by the plaintiffs, for no property, even defeasible, ever passed from the plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with Seddon. These points were decided, as I think rightly, in the case of *Hardman* v. *Booth*[1]. From the terms of reservation (set out in the note to the report of the present case[2]) it appears that the defendant had an opportunity to have that case reviewed in a Court of Appeal, if so advised, for it is said that, 'The defendants be at liberty to argue, if necessary, that the sale by Bayley under the circumstances gave a good title to a bonâ fide purchaser for value without notice.' The Court of Queen's Bench, being bound by the decision of a Court of co-ordinate

[1] 1 H. & C. 803.

[2] L. R. 7 Q. B. 620.

jurisdiction, could not so hold; and the defendants have not raised the point for a Court of Appeal. I proceed to state the further facts. Hollins, the defendants, as brokers, acting for Messrs. Micholls, and Messrs. Micholls, as customers, acting through the defendants as brokers, dealt with Bayley in a manner which would have been quite right, if Bayley had been an honest man, or, even a dishonest man, if entrusted by the plaintiffs with the possession of the goods, as an agent, for sale. And the defendants and Micholls were both innocent of any knowledge of any infirmity in Bayley's title, and not only were they innocent, but I think there is nothing amounting even to evidence of negligence on the part of the defendants in dealing with Bayley without further inquiry, nor, *à fortiori*, in Micholls who trusted the defendants to act for him, and dealt with Bayley because the defendants selected him. Under those circumstances, your lordships ask the question, whether the plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton. And I answer that question in the affirmative. However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman* v. *Booth*[1] is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiffs' goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs: see *Stephens* v. *Elwall*[2] and *Garland* v. *Carlisle*[3]. And, accordingly, I think it has not been disputed by any one, that if the plaintiff had sued Micholls, who has worked this cotton up into yarn, Micholls must have had judgement against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the defendants Hollins, who honestly handed it to Bayley. And I take it that if the defendants have done what amounts in law to a conversion, they also must be liable to pay the plaintiffs. It is hard on them, I agree, but I do not think it is harder than it would have been on Micholls. Indeed, I think, that if the plaintiffs were told that they had recourse, at their option, against either the broker or the spinner they might, without any obvious

[1] 1 H. & C. 803. [2] 4 M. & S. 259.
[3] 4 Cl. & F. 693.

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injustice, have said: Then make the broker pay, for he went to Bayley's, so that if there is any fault it is his. But we cannot act on any notions of hardship. When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the legislature thought fit to make a sale in the cotton market at Liverpool equivalent to a sale in market overt, the loss would have fallen on the plaintiffs. As it is it falls on any one who has done what the law esteems a conversion. We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself, the equally innocent plaintiff. If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the legislature to alter the law. That has been done to a very considerable extent by the Factors Acts, and it may be expedient to extend that alteration further, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as broker or otherwise, dealing with a person in the position of Bayley in this case. And I apprehend your lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardship of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case, viz. whether what the defendants did amounts on the established principles of law to a conversion. I own that it is not always easy to say what does and what does not amount to a conversion. I agree with what is said by my Brother Brett in his judgement below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the plaintiff and some clear for the defendant, and that the difficulties arise in doubtful cases on the border-line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered. Lord Mansfield says, in *Cooper* v. *Chitty*[1]: 'The bare defining of this kind of action and

[1] 1 Burr. 20; 1 Sm. L. C. 417.

the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction, in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten.' It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification. From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods. And in considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title. There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a bonâ fide ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a bonâ fide doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion: see *Isaack* v. *Clarke*[1]; *Vaughan* v. *Watt*[2]. The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances, excused, if not justified. So the finder of goods is justified in taking steps for their protection and safe

[1] 1 Buls. 306, see 312.

[2] 6 M. & W. 492.

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custody till he finds the true owner. And therefore it is no conversion if he bonâ fide removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified. I cannot find it anywhere distinctly laid down, but I submit to your lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the bonâ fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or entrusted with their custody. I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties. Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner: see *Heald* v. *Carey*[1]; *Alexander* v. *Southey*[2]. And the same principle would apply to the cases alluded to by my Brother Hannen in his judgement in the Court below, of persons 'acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger.' It will enable us also to answer a question put during the argument at your lordships' bar. It was said: 'Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion? I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is primâ facie an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had

[1] 11 C. B. 977.

[2] 5 B. & A. 247.

it in fact to another who was going to use it up, the question would be nearly the same as that in the present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge. And on the same principle I take it the ruling of Lord Tenterden in *Greenway* v. *Fisher*[1] may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord Tenterden on this ground, but on that of the packer's being a public employment, which I think my Brother Brett, in his judgement below, correctly shows to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not, like a carrier or innkeeper, bound to receive all goods brought to him. I think, however, it is but candid to admit that the principle I have submitted to your lordships, though it will solve a great many difficulties, will not solve all.

In Comyns's *Digest*[2] it is said, 'If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion': per Berkly, 1638. To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or suppose the plaintiffs in the case at your lordships' bar had, for some reason, brought the action against Micholls's men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavour to answer it. I think it is not necessary now to do so, for I think that what the defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground, taken in the earlier part of my

[1] 1 C. & P. 190.

[2] Action on the Case—Trover, E.

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Brother Cleasby's judgement below, that the defendants themselves were the purchasers from Bayley, for though, if it were left to me to draw inferences of fact, I should draw that inference. I doubt if it is open to me so to do after the finding of the jury affirming that the defendants were agents. But though it is to be taken in favour of the defendants that they acted throughout as brokers, and only as brokers, for Micholls, I still think them guilty of a conversion. The case against them does not rest on their having merely entered into a contract with Bayley, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material: see *Parker* v. *Godin*[1]. There, 'the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the Court, a new trial was granted, upon the fact of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use.' No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens* v. *Elwall*[2], where Lord Ellenborough says: 'The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it.' No case harder than that of the defendant in *Stephens* v. *Elwall*[2] can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover: see *Garland* v. *Carlisle*[3]. The legislature altered the law to avoid that hardship, making the loss in future fall on the assignees; and the legislature may, to avoid the hardship on persons situated like the defendants, extend the protection now given to purchasers in market overt, and to

[1] 2 Str. 813. [2] 4 M. & S. 259. [3] 4 Cl. & F. 693.

persons dealing with agents entrusted under the Factors Acts, to brokers dealing with any one in the ordinary markets. Those who agree with the opinion expressed by the Lord Chief Baron [1] that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it. But I think that the law as it exists does not protect such brokers.

The conversion in the case of *Stephens* v. *Elwall* [2] consisted in assisting in transferring the goods from Deane to the defendant's master in America, with intent to transfer Deane's *de facto* property to the defendant's master. Deane's title was bad against the plaintiffs, who were assignees of Spencer, because he had bought the goods from Spencer after an act of bankruptcy, though of that the defendant was ignorant, unavoidably ignorant, says Lord Ellenborough. The conversion in the present case consists in, by means of the delivery order, transferring the goods from Bayley to Micholls with intent to transfer *de facto* Bayley's property to Micholls. Bayley's title was bad against the now plaintiffs, though of that the defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens* v. *Elwall* [2] may be over-ruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross* v. *Johnson* [3], cited by my Brother Brett, is not in point. There the defendant had received goods as plaintiff's warehouseman. They were lost, and the ruling of the Court was, that though an action might lie for negligence, if there was any, there was no conversion.

The *Lancashire Wagon Company* v. *Fitzhugh* [4] was an action for the injury to the reversionary interest of the plaintiffs in certain goods let to one Pell for a term. The sheriff had seized and sold those goods under an execution against Pell. He had a right to sell Pell's limited interest, but none to sell the plaintiffs' interest, and the question raised, or at least intended to be raised, on the record was, whether the sheriff had done anything injurious to the plaintiffs' interest. I have failed to see how the decision

[1] L. R. 7 Q. B. 641.
[2] 4 M. & S. 259.
[3] 5 Burr. 2825.
[4] 6 H. & N. 502.

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bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and delivery to one who uses the goods is, makes against the defendants.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your lordships' question in the affirmative.

BRETT, J.—The real question, which I cannot doubt it was the intention of Justice Willes to have discussed, is, whether every actual dealing with a chattel in a manner inconsistent with the right of a true owner gives to the true owner a right of action in trover against every person so dealing, except a common carrier, or whether the dealing with the chattel, in order to support against him who has dealt with it an action of trover, must not be with intention to interfere with the property in the chattel. I believe that he desired to have set at rest the divergence of opinion on this point between Baron Martin and the other barons in the case of *Burroughes* v. *Bayne*[1]. In that case Baron Martin says[2]: 'But the word "conversion," by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them.' Farther on he explains what he intends by this. He quotes from the judgement of Alderson, B., in *Foulkes* v. *Willoughby*[3], thus: 'Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion.' 'I,' says Martin, B., 'entirely accede to this view of the law, which is simple and of easy application.' It is obvious that Martin, B., took a very large view of the term 'conversion,' and that the question of the right interpretation of the term is very important, for upon it may depend whether a defendant is to be held liable in trover for the full

[1] 5 H. & N. 296. [2] 5 H. & N. 302, 303.
[3] 8 M. & W. 540.

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value of the chattel in dispute or in trespass for perhaps only nominal damages. In the same case of *Burroughes* v. *Bayne*[1], Channell, B., says: 'I desire it to be understood that I do not mean to state, or suggest, that every detention is a conversion: I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion.' Bramwell, B., says[2]: 'It certainly is not every detention of goods, although there is no right to detain them, that is a conversion, in my judgement at all events.' Again: 'The result is, you must in all cases look to see not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use.' Again: 'If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing. Instead of which, by the use of the word "conversion," the defendant is made liable for the value of the billiard-table, which he cannot recover from any one else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff, &c.' In the judgement in the Exchequer Chamber[3], Martin, B., repeated the same view of a conversion which he had stated in *Burroughes* v. *Bayne*[4]: 'But as regards the action of trover,' he says, 'I think it is well settled that the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel, inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it is immaterial whether the

[1] 5 H. & N. at p. 305.
[2] 5 H. & N. at pp. 308, 309.
[3] L. R. 7 Q. B. at p. 631.
[4] 5 H. & N. at p. 296.

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act done be for the use of the defendant himself or of a third person.' Now the greater part of the propositions thus enunciated by Martin, B., are identical with the propositions of the other judges. All, I think, agree that the assumption and exercise of dominion over a chattel, inconsistent with the title of the true owner, is a conversion. All would agree that the detaining goods so as to deprive the person entitled to the possession of them of his dominion over them is a conversion, if by the word 'dominion' in the last proposition is intended 'title as owner.' The essential difference between the view of Baron Martin and the other judges I have mentioned is in the sense in which this word 'dominion' is used by him and them. When Baron Martin speaks of interfering with the dominion of the true owner, he means interfering with the mere possession or right of possession of the owner. The other judges mean an interference or dealing with, or doing some act in negation of, the title as owner of the true owner. Baron Martin holds that every asportation or detention which cannot be justified, i. e. which is not done for the true owner, is a conversion. Baron Channell and Baron Bramwell hold that a mere simple asportation or detention is not of itself a conversion, but only when either is done in a manner or with an intention inconsistent with the proprietary title, as owner, of the true owner. If the findings of the jury in the present case are to be treated as I have suggested they should be treated, then the question in this case is, What is the proper definition of the term 'conversion' in a case in which an asportation of the chattel is relied on as the conversion? If the first finding is to be treated as a binding decision that the defendants in making the contract acted only as brokers, so that they did not themselves buy the cotton as buyers, and so that they did not sell it as sellers, then what they thus did is clearly, I think, no conversion. The reasons for this I gave in my judgement below[1]. If the second finding is treated as a decision that the asportation was a mere simple asportation, made without intention of or relation to interference with any one's title, then such asportation is no conversion unless the definition of Martin, B., is preferred to that of Bramwell and Channell, BB. It cannot fail to be observed that the definition of Martin, B., includes the cases of a carrier, wharfinger, warehouseman, and packer, even when there is no demand and

[1] L. R. 7 Q. B. at p. 621.

refusal; and that in order to meet the difficulty, he, in his judgement in the Exchequer Chamber, declares that the case of a carrier is to be excepted, because he is bound by law to receive and carry the goods of every one who brings goods to him; and that the case of a packer is not properly an exception, and that the case of *Greenway* v. *Fisher*[1] is wrongly decided. I endeavoured in the Exchequer Chamber to explain all the cases which are called exceptional, by showing that the definition of a conversion laid down by Bramwell and Channell, BB., is the correct definition, and that if so, the cases referred to are properly decided, not because they are exceptions to, but because they are outside the rule. I cannot assist much further upon this point than I endeavoured to do in that judgement, to which I beg to refer. In addition, however, I may say that in *Simmons* v. *Lillystone*[2] Parke, B., says: 'Here the defendant never intended to take to himself any property in the timber,' and, 'We are all of opinion that there was no sufficient evidence of a conversion. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it.' If the last phrase be expanded, it clearly means 'or to deprive the plaintiff of the property in the goods.' In Chitty on *Pleading*[3] it is said: 'There may be a conversion, firstly, by wrongfully taking a personal chattel; secondly, by some other illegal assumption of ownership, or by illegally using or misusing goods; or thirdly, by a wrongful detention.' Looking to the phraseology of the second branch, which speaks of 'some other assumption of ownership,' it is obvious that the taking in the first branch is a taking as in right of ownership in the defendant, or in some one other than the plaintiff. In explaining the second branch, the learned author says: 'So the wrongful assumption of the property in goods may be a conversion of itself, or the wrongful assumption of a right of disposing of them.' And under the latter, he gives as instances a wrongful user of the goods, i. e., I apprehend, a user as if the defendant or some one other than the plaintiff were the owner, and a misuser by the defendant, as by breaking bulk, or consuming, or transforming, which are all cases of the exercise of acts as of ownership. It seems apparent to me that a claim or exercise of ownership is throughout

[1] 1 C. & P. 190. [2] 8 Ex. 437.
[3] Vol. i. tit. Trover, 172, edition 1844.

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been liable, or as Baron Martin puts it, 'could not Bayley had he been the true owner have maintained an action against them for the price.' Is, then, their position different with regard to the sellers or the owners of the goods because the goods happened to suit Micholls & Co.? Did not the defendants, whether as agents or principals, intermeddle with goods which were not their own, and exercise a dominion over them inconsistent with the right of the true owner?

I am of opinion that they did, and that they do not come within the exceptions or qualifications which have been recognized in cases such as those of a carrier; the exception of a broker in such cases could only, in my judgement, apply when he is a mere negotiator or intermediate between two other contracting parties, and not when he buys without authority from another to buy, and merely on the expectation of finding a purchaser. I therefore answer your lordships' question in the affirmative.

MELLOR, J., and CLEASBY, B., agreed with the opinion of BLACKBURN, J., and AMPHLETT, B., with that of BRETT, J.

The House of Lords—Lords CHELMSFORD, CAIRNS, HATHERLEY, and O'HAGAN—unanimously affirmed the judgement of the Court of Exchequer Chamber.

1856. JEFFRIES *v.* THE GREAT WESTERN RAILWAY COMPANY,

25 L. J. (Q. B.) 107; s. c. 5 E. & B. 802.

A plaintiff who is in actual possession of goods at the date of a conversion, though himself a wrongdoer, can maintain trover for them, and the defendant cannot set up a *ius tertii* unless he claims under it.

Actual possession of chattels is primâ facie evidence of property therein.

1856.

JEFFRIES v. THE GREAT WESTERN RAILWAY COMPANY.

Trover for the conversion of ten wagons.

Pleas—First, not guilty; secondly, that the said wagons were not the goods of the plaintiff.

On the trial, before Pollock, C. B., at the Gloucester Summer Assizes, 1855, it appeared that the plaintiff claimed title to the wagons under an absolute sale to him by *O.*, a limestone-merchant, on March 10, 1854, the alleged consideration for the sale being an acceptance by the plaintiff for £462 10*s.* and £7 10*s.* in cash. At

the time of the sale the wagons were used by *O.* in carrying limestone purchased by him at quarries of the plaintiff in Denbighshire, called the Minera Quarries, over the defendants' line of railway to Wolverhampton, and *O.* continued in possession of the wagons, and used them in the same manner to the end of December 1854. On December 28, 1854, *O.* committed an act of bankruptcy, and on January 16, 1855, the adjudication of bankruptcy and the appointment of assignees took place. On January 5, 1855, *O.* executed an assignment of the same wagons to the defendants to secure a debt due to them, the defendants having no notice of the prior act of bankruptcy. It further appeared that early in January the plaintiff took possession of the wagons, and, after an application to the defendants, became a carrier of limestone on their line from the same quarry to Wolverhampton, on his own account, and used the wagons for that purpose; he had also about the same time directed that the name of *O.*, then on the wagons, should be painted out, and this had been done to nearly all the wagons. On March 30, 1855, the wagons were standing at a private siding belonging to the plaintiff's quarry, and were taken away by the defendants, they claiming title to them under the assignment of January 5, 1855. An action, brought on May 24, 1855, by the assignees of the bankrupt *O.* against the defendants to recover the value of the wagons, had been tried at the Warwick Summer Assizes, 1855, and a verdict found for the defendants. The present action was brought in June 1855.

At the close of the plaintiff's case it was contended that, assuming the sale by *O.* to the plaintiff to be bonâ fide and for a good consideration, the defendants were entitled to prove the title of the assignees in bankruptcy valid, as against the plaintiff, and to rely on such title to protect the subsequent assignment by *O.* to the defendants, and as an answer to the action. The Lord Chief Baron ruled that the defendants were not at liberty to set up the title of the assignees, and a verdict was found for the plaintiff for £470. In the following term a rule *nisi* for a new trial was obtained on the ground of misdirection, and also upon affidavits as to the consideration for the assignment to the plaintiff.

LORD CAMPBELL, C. J.—In this case I am of opinion that the Lord Chief Baron was right in rejecting the evidence tendered to

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impeach the title of the plaintiff, because at the time of taking the wagons the defendants had no title to them, and were to be considered as mere strangers, and the plaintiff had been for a considerable time in possession of the wagons quietly and peaceably, and had used them as his own. Under these circumstances, I think that the *ius tertii* could not be set up. The defendants were trying to set up the title of the assignees, thereby acknowledging they had no good title of their own; and if they had no title, they were wrongdoers at the time of the conversion; and being wrongdoers, and the plaintiff in possession, I am of opinion that, according to the law of England, they were not entitled to question the title of the plaintiff. I conceive the law is, that if a person is peaceably and quietly in possession of a chattel as his own property, a person who takes it from him, having no good title, is a wrongdoer, and such person cannot defend himself by showing that the chattel is not the property of the plaintiff, but the property of a third person. The law is laid down in most clear and express terms in the case of *Wilbraham* v. *Snow*[1] and the notes to that case by the very learned editor, Mr. Serjeant Williams, vouching a number of authorities to show that such is the law of England; and it is most reasonable and most essential to society that it should be so. It is of the greatest importance that a man shall not, having no good title of his own to the property, be allowed to seize it, and thereby probably bring about a breach of the peace and occasion great mischief and confusion. I think the law has not been at all impeached by any of the authorities that have been cited. It is allowed that if an action of trespass is brought by the party in possession, the defendant cannot set up the *ius tertii*, he having no right in himself. I think there is no difference whatever for this purpose between an action of trespass and an action of trover. In both cases the plaintiff rests on his possession of the property; and the question is, whether a person who has no title whatever of his own shall be allowed to show that the plaintiff has not the right of property. The right of property is presumed from the possession; and is that presumption to be rebutted by evidence on the part of the defendant, a mere stranger and wrongdoer, showing that the plaintiff was not the real owner of the chattel? I am of opinion that that cannot be done. This was an attempt to do that, and

[1] 2 Wms. *Saund.* 87.

I think the Lord Chief Baron intimated a proper opinion when he said, upon that evidence being tendered, that it was not admissible. With regard to what is mentioned in the affidavit, we think that there is important evidence which has been obtained since the trial, and, therefore, there ought to be a new trial to admit that evidence.

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WIGHTMAN, J.—In the present case the plaintiff was in possession of the trucks upon the railway, and the defendants took them out of his possession, and now they propose to take the right of possession out of him by showing that some one else had the right to the possession at that time. That, I think, by law they are not entitled to do. In this case it seems to me the company must be taken to be mere wrongdoers; and that being so, they are not to be allowed to set up the title of any one else. The law, as laid down or recognized by the old authorities, will be found collected in a note to the case of *Wilbraham* v. *Snow*[1]. From that it appears that mere possession will give the possessor such a property in goods as will enable him to maintain an action of trover against a wrongdoer. Supposing, therefore, the plaintiff had not a good title, yet having possession it is sufficient for this action. A number of cases have been cited, but all of them are distinguishable from the cases referred to in the note to *Wilbraham* v. *Snow*[1]. In some of them the plaintiff was not in actual possession, and no doubt trover may be maintained upon the ground of title to the chattel without actual possession; therefore, it might well be that in such a case the defendant might be permitted to set up the *ius tertii*; but I know of no case where a plaintiff having actual possession of property had brought an action of trover, in which the defendant, who set up no title in himself, was allowed to show a title in a third person, and so enable himself, a wrongdoer, to maintain the possession he had wrongfully taken. On these grounds, it seems to me the Lord Chief Baron was right in rejecting the evidence with respect to the title of the assignees. On the other ground, I agree that the rule should be made absolute.

CROMPTON, J.—We are called upon to decide the question whether a wrongdoer in possession is entitled to maintain an action of trover against another wrongdoer, without the latter being

[1] 2 Wms. *Saund.* 87.

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allowed to set up a title in a third person, the real owner; and my impression is the same as that of the rest of the Court. At the same time, I cannot help saying we are now deciding a matter about which there has been considerable doubt. In a note of my Brother Williams to *Wilbraham* v. *Snow*[1], it is said, 'As to whether the simple fact of possession is conclusive evidence, and constitutes a complete title in all cases against a defendant, who is a mere wrongdoer (as it does in actions of trespass to real property): see Baron Parke in *Elliot* v. *Kemp*[2].' Upon looking at that I find very considerable doubt is thrown upon that point by Baron Parke, who says, 'It is unnecessary in this case to decide the question, whether, in an action of trespass or trover for personal property, the simple fact of possession, which is unquestionably evidence of title, is conclusive evidence, and constitutes a complete title in all cases against a defendant who is a wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels, for in the present case the plaintiffs were not in possession of the chattels, the subject of this suit, at the time of the conversion.' We are now, therefore, deciding a point on which considerable doubt has been entertained. My impression certainly is with the old cases, that the possession of a wrongdoer is sufficient as against another wrongdoer. I think the cases cited in the note to *Wilbraham* v. *Snow*[1] bear that out; and what is quite clear here is, that the defendants are wrongdoers within that rule, and could not therefore set up a title in a third person. The best opinion I can form is in accordance with what is decided by the old authorities collected in the note to *Wilbraham* v. *Snow*[1]; and it is said in another part of the note, what used to be always taken as the old law, that wherever trespass will lie *de bonis asportatis* trover will lie. Upon the whole, my strong impression is, that the decision of the Lord Chief Baron was right. Upon the other ground I think the rule ought to be absolute.

Rule absolute.

NOTE.—Where the plaintiff in trover is not in actual possession of the goods at the date of the alleged conversion, in order to succeed he must prove his title to the property in the goods (which is sufficiently evidenced

[1] 2 Wms. *Saund.* 87. [2] 7 M. & W. 306; s. c. 10 L. J. (Exch.) 321.

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by showing a right to the immediate possession), and his title thus coming in issue it is open to the defendant to rebut it by setting up a *ius tertii*: see *Leake* v. *Loveday* (1842)[1]. There the plaintiff was the holder of a bill of sale upon the goods of one Cox, and left the goods in Cox's possession. Cox subsequently became bankrupt; and the right of property in and possession of the goods passed thereupon to his assignees in bankruptcy, as being in the 'order and disposition' of the bankrupt. Before the assignees had taken possession of the goods they were seized by the defendant under a writ of *fi-fa*. The plaintiff then brought an action of trover against the defendant, and it was held that, as the plaintiff was not in actual possession at the date of the alleged conversion, he was called upon to prove his title to the property in the goods, and that the defendant might, therefore, set up the title of the assignees in bankruptcy, although he did not act by their authority: see, too, Pollock and Wright on *Possession*, p. 91.—[ED.]

1902. 'THE WINKFIELD,' L. R. 1902. P. 42 (C. A.).

The bailee in possession of goods can maintain trespass or trover or an action on the case for damage to them by the tortious conduct of the defendant, even if the bailee is not answerable over to his bailor.

Semble, to hold otherwise, would be in effect to permit a wrongdoer to set up a *ius tertii* under which he does not claim.

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'THE WINKFIELD.'

Appeal by the Postmaster-General against a decision of Sir F. H. Jeune, P., confirming a report of the registrar disallowing a portion of a claim in respect of the contents of certain mail-bags lost in a collision.

The facts and arguments sufficiently appear from the judgement.

COLLINS, M. R.—This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of *The Winkfield*.

The question arises out of a collision which occurred on April 5, 1900, between the steamship *Mexican* and the steamship *Winkfield*, and which resulted in the loss of the former with a portion of the mails which she was carrying at the time.

The owners of the *Winkfield* under a decree limiting liability to £32,514 17*s.* 10*d.* paid that amount into court, and the claim in question was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal to recover out of that sum the value of letters, parcels, &c., in his custody as bailee and lost on board the *Mexican*.

[1] 4 M. & G. 972; S. C. 12 L. J. (C. P.) 65.

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The case was dealt with by all parties in the Court below as a claim by a bailee who was under no liability to his bailor for the loss in question, as to which it was admitted that the authority of *Claridge* v. *South Staffordshire Tramway Co.*[1] was conclusive, and the president accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's Case*[1] was well decided. I emphasize this because it disposes of a point which was faintly suggested by the respondents, and which, if good, would distinguish *Claridge's Case*[1], namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. The point was not taken below, and having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt with on the motion, namely, that it is covered by *Claridge's Case*[1]. I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state I am of opinion that *Claridge's Case*[1] was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *ius tertii* unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall show presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner

[1] [1892] 1 Q. B. 422.

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of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor.

I think this position is well established in our law, though it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and, further, I think it can be shown that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory* v. *Delamirie*[1], not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries* v. *Great Western Ry. Co.*[2], 'that the person who has possession has the property.' In the same case he says[3]: 'I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for *against a wrongdoer possession is title.* The law is so stated by the very learned annotator in his note to *Wilbraham* v. *Snow*[4].' Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold other-

[1] 1 Stra. 504 and *supra*, p. 292.
[2] 5 E. & B. 802, at p. 806.
[3] 5 E. & B. 802, at p. 805.
[4] 2 Wms. *Saund.* 47 f.

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wise would, it seems to me, be in effect to permit a wrongdoer to set up a *ius tertii* under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter.

I think this view is borne out by authority; for instance, in *Burton* v. *Hughes*[1] the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it without giving in evidence the written agreement under which he held it. The point made for the defendant was that 'the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped.' The argument on the other side was 'that the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action.' Best, C. J., in delivering judgement says: 'If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to—*Sutton* v. *Buck*[2] —confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover.' By holding, therefore, that the agreement defining the conditions of the plaintiffs' interest was immaterial the Court in effect decided that the right of the bailee, in possession, to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton* v. *Buck*[2], on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover.

[1] 2 Bing. 173; 27 R. R. 578. [2] 2 Taunt. 302; 11 R. R. 585.

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The plaintiff had taken possession of a stranded ship under a transfer void for non-compliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir James Mansfield, C. J., had non-suited the plaintiff, on the ground that the transfer was defective without registration. On motion the non-suit was set aside, Sir James Mansfield being a member of the Court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that Chambre, J., reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did—a contention which was rejected by the Court.

In *Swire* v. *Leach*[1] a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong Court, consisting of Erle, C. J., Williams and Keating, JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognized as well established. See also *Turner* v. *Hardcastle*[2], a considered judgement of the Court of Common Pleas, which included Willes, J., who had not been a party to *Swire* v. *Leach*[1], and where the bailee's right to recover full damages and his obligation to account to the bailor is again affirmed.

The ground of the decision in *Claridge's Case*[3] was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think this position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Heydon and Smith's Case*[4]—and itself drawn from the Year Books—has been repeated in many subsequent cases. The words are these: 'Clearly, the bailee, or he who hath a special property,

[1] 18 C. B. (N. S.) 479.
[2] 11 C. B. (N. S.) 683.
[3] [1892] 1 Q. B. 422.
[4] 13 Rep. 69.

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shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over.'

It is now well established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other.

Holmes, C. J., in his admirable lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167: 'At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner.' And again, at p. 170: 'The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue.' This inversion, as he points out, is traceable through the Year Books, and has survived into modern times, though, as he shows, it has not been acted upon. Pollock and Maitland's *History of English Law*, vol. ii. 170, puts the position thus:—'Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable, and was liable because he had the action.' It may be that in early times the obligation of the bailee to the bailor was absolute, that is to say, he was an insurer. But long after the decision of *Coggs* v. *Bernard*[1], which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable

[1] (1704) 2 Ld. Raym. 909.

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to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the Year Books may be explained, as Holmes, C. J., explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our Courts. Upon this, before the decision in *Claridge's Case*[1], there was a strong body of opinion in textbooks, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: see Mayne on *Damages*, fourth edition, 381, and cases there cited; Sedgwick on *Damages*, seventh edition, vol. i. 61 n. (*a*); Story on *Bailments*, ninth edition, s. 352; Kent's *Commentaries*, twelfth edition, vol. ii. 568 n. (*e*); Pollock on *Torts*, sixth edition, 354, 355; Addison on *Torts*, seventh edition, 523; and as I have already pointed out, Williams, J., the editor of Williams's *Saunders*, was a party to the decision of *Swire* v. *Leach*[2]. The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted: see them referred to in the passages cited, and in particular see *Ullman* v. *Barnard*[3]; *Parish* v. *Wheeler*[4]; *White* v. *Webb*[5]. The case of *Rooth* v. *Wilson*[6] is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. Abbott, J., says shortly: 'I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action'; and Bayley, J., points out that case is a possessory action. But Lord Ellenborough undoubtedly rests his judgement on the view

[1] [1892] 1 Q. B. 422.
[2] 18 C. B. (N. S.) 479. [See also Mr. Justice Wright in Pollock and Wright on *Possession*, 166.]
[3] (1856) 73 Mass. Rep. 554.
[4] (1860) 22 New York Rep. 494.
[5] 15 Conn. Rep. 302.
[6] 1 B. & A. 59.

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that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt, was his personal view, but it was not the decision of the Court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shown by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor: see Com. Dig. *Trespass* B. 4, citing Roll. 551, l. 31, 569, l. 22; Story on *Bailments*, ninth edition, s. 352, and the numerous authorities there cited.

The liability by the bailee to account is also well established —see the passage from Lord Coke, and the cases cited in the earlier part of this judgement—and therefore it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's Case*[1]. I am aware that in two able textbooks, Beven's *Negligence in Law* and Clerk and Lindsell on

[1] [1892] 1 Q. B. 422.

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Torts, the decision in *Claridge's Case*[1] is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's Case*[1] was treated as open to question by the late Master of the Rolls in *Meux* v. *Great Eastern Ry. Co.*[2], and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence.

STIRLING and MATHEW, L. JJ., concurred.

Appeal allowed.

1871. BRINSMEAD *v.* HARRISON, L. R. 6 C. P. 584.

If two commit a joint tort, judgement against one is of itself, without satisfaction, a sufficient bar to an action against the other for the same cause.

Where in trover judgement has been obtained for the full value of the chattel, the property in the chattel is vested in the defendant upon satisfaction of the judgement, but not otherwise[3].

Detinue for a pianoforte.

Fourth plea, that the detention in the declaration mentioned was committed by the defendant under the direction of and jointly with one A. M. Thompson, and not otherwise; that the plaintiff theretofore, in this Court, sued the said A. M. Thompson for the conversion and detention of the goods in the declaration mentioned, and recovered against her £41 10*s.* damages and his costs of suit; that the said judgement still remained in force; and that there never was any detention of the said goods other than what was done jointly with the said A. M. Thompson, for which damages were recovered as aforesaid.

[1] [1892] 1 Q. B. 422. [2] [1895] 2 Q. B. 387.

[3] But a recovery of damages for a nuisance or trespass to land will not operate as a purchase of the right to continue such nuisance or trespass and a fresh action may be brought for such continuance: *Holmes* v. *Wilson*, 10 A. & E. at p. 503.

1871.

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Replication, that the alleged judgement against the said A. M. Thompson was at the commencement of this suit, and still remained, wholly unsatisfied; and that the plaintiff had always been and still was wholly unable to obtain satisfaction of the same. The plaintiff also new-assigned that he sued, not only for the detention of the said pianoforte therein admitted, but also for the detention thereof upon other and subsequent occasions, to wit, after the alleged recovery and until the commencement of this suit and until now.

Demurrers to the replications, on the ground that, whether the judgement was satisfied or not, was immaterial; and that the justification pleaded showed that the property was changed. Joinder.

The judgement of the Court (WILLES and MONTAGUE SMITH, JJ.) was delivered, June 23, by

WILLES, J.—We decided yesterday that, according to the law laid down by Lord Wensleydale in *King* v. *Hoare*[1], a judgement in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There remains, however, an entirely different question, which arises upon the new-assignment, and which is, whether a judgement in trover, without satisfaction, changes the property in the goods so as to vest the property therein in the defendant from the time of the judgement, or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the goods vests in the defendant. It is obvious that this is a different question from that which we have already disposed of; because, if the mere recovery vests the property in the defendant, the property is equally changed as to all strangers. It is a question which affects the transfer of property generally.

We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding *in rem*: it is to recover primâ facie the value of the goods. It may be that the goods have been returned, and the judgement given for nominal damages only. To say in such a case that the mere obtaining judgement vests the property in the defendant would be an absurdity. It is clear, therefore, that the judgement

[1] 13 M. & W. 494.

has no specific effect upon the goods. The only way the judgement in trover can have the effect of vesting the property in the defendant is, by treating the judgement as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in Jenkins, fourth century, Case 88. Any other construction would seem to be absurd.

This question whether the property is changed by the mere recovery in trover appears to have led to much difference of opinion. The authority mainly relied upon by Mr. Powell was the dictum of Jervis, C. J., in *Buckland* v. *Johnson*[1], in which that very learned and accurate judge did lay it down, upon the authority of a case in Strange[2], that the property is changed by the mere recovery, without any satisfaction. I would observe, however, that the case, as reported in Strange, is far from satisfactory. It is also reported in Andrews, p. 18, where the case is thus stated: 'An action of trover was brought by the present plaintiff against one Mason, wherein he obtained judgement by default, and afterwards had final judgement; whereupon a writ of error was brought. And another action was now brought against Broughton by the same plaintiff, and for the same goods for which the first action was brought.' An application appears to have been made to hold the defendant in the second action to special bail; and there was sufficient reason why special bail should not be allowed, because the judgement against Mason had the effect of preventing a second action being maintained against Broughton. The loose expressions of the Court,—that 'the property of the goods is entirely altered by the judgement obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world,'—were quite unnecessary. The same may be said as to the dictum of Jervis, C. J., in *Buckland* v. *Johnson*[1]. That was an action against a person who jointly with his son had sold goods the proceeds of which the defendant had received. After the sale, the plaintiff (who claimed the goods), in ignorance that the father had received the money, brought an action against the son for money had and received and

[1] 15 C. B. 145, 157; 23 L. J. (C. P.) 204.
[2] *Adams* v. *Broughton*, 2 Str. 1078.

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for damages for the conversion, and recovered a verdict for £100 against him; but, not succeeding in obtaining satisfaction, in consequence of the son's insolvency, he brought a second action against the father for the same causes. It is clear that the proceedings in the first action amounted to an election to treat the matter as a wrong, and precluded the plaintiff from bringing a fresh action for money had and received. It was equally clear that the judgement in the first action was a merger of the remedy against either the father or the son; and, when the action was brought against the father, the answer was obvious. It was wholly unnecessary, therefore, to decide, as suggested by Jervis, C. J., that the recovery in the first action changed the property; and what was said was properly treated by the reporter as amounting only to a 'semble.'

On the other hand, there is a series of decisions showing that a mere recovery, without satisfaction, has not the effect of changing the property. In Jenkins, fourth century, Case 88, it is said: 'A., in trespass against B. for taking an horse, recovers damages; by this recovery, *and execution done thereon*, the property of the horse is vested in B. *Solutio pretii emptionis loco habetur.*' That doctrine is acted upon in *Cooper* v. *Shepherd*[1]; and, though the marginal note treats the *recovery* as changing the property,—a doctrine thrown out also in the note to *Barnett* v. *Brandao*[2],—the plea shows that the damages were satisfied; and the judgement of Tindal, C. J., shows that the property vests in the defendant only 'on payment of the damages.' To the same effect are the observations of Holroyd, J., in *Morris* v. *Robinson*[3]. 'Where in trover,' he says, 'the full value of the article has been recovered, it has been held that the property is changed by judgement and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover.' To the same effect is the note in 2 Wms. *Saund.* 47 *c c*, n. (z). It may also be proper to refer to the note to the case of *Holmes* v. *Wilson*[4], in which the law is stated by the reporters probably at the suggestion of one of the judges. The good sense of the thing and abundant authority thus appearing, we feel bound to give judgement for the plaintiff upon the new-assignment.

[1] 3 C. B. 266.
[2] 6 M. & G. at p. 640.
[3] 3 B. & C. 196, at p. 206.
[4] 10 Ad. & E. at p. 511.

In order, however, to act upon our judgement of yesterday and to-day, it must be recollected that the present defendant will not be liable except in respect of a wrong other than that which was the subject of the action against the other wrongdoer.

Another point arises upon the new-assignment. The plaintiff may have acquired the property in the goods after the recovery of the judgement in the former action. As, however, that point was not argued, we prefer resting our judgement upon the main point.

The judgement therefore will be for the defendant upon the sixth plea, and for the plaintiff upon the new-assignment.

Judgement accordingly.

NOTE.—On the first point this judgement was affirmed in the Court of Exchequer Chamber[1], the second point not being argued. The judgement of Blackburn, J., in that Court was as follows:—

BLACKBURN, J. — The question raised upon this record is whether the claim of the plaintiff against two joint wrongdoers is put an end to by a judgement recovered in an action against one of them without showing that that judgement has been satisfied. I apprehend that it is, on the ground that transit *in rem iudicatam*, or upon the general principle of convenience which is expressed in the maxim '*Interest reipublicae ut sit finis litium.*' Is it for the general interest that, having once established and made certain his right by having obtained a judgement against one of several joint wrongdoers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others. It is unnecessary to go into the earlier cases. But, in the reign of James I, it was distinctly decided in *Brown* v. *Wootton*[2] that a judgement recovered in trover might be pleaded in bar to a second action against a different person for the same cause, without averring satisfaction; 'for,' say the Court, 'the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgement against one person for damages certain, that which was uncertain before is reduced *in rem iudicatam*, and to a certainty.'

[1] L. R. 7 C. P. 547.

[2] Cro. Jac. 73; Yelv. 67; Moore, 762.

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Whether that which is added by Popham, C. J., is right or wrong, there is a distinct decision of the Court of Queen's Bench: and in the next century that great lawyer, Chief Baron Comyns, gives the high authority of his sanction to it. In more modern times, Baron Parke, probably the most acute and accomplished lawyer this country ever saw, holds the same doctrine in *King* v. *Hoare*[1]. I find no dictum of authority and no decision the other way. If this were *res integra*, I should have considered the American cases referred to entitled to great respect. But, for the reason given by the Court in *Brown* v. *Wootton*[2], which works no injustice, and which has been acted upon for centuries, although no decision of a Court of error has been pronounced upon it, I think we are bound, even sitting in a Court of error, to decide in conformity with it. I observe that the Court of Common Pleas, in their judgement upon the demurrer to the new-assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is unnecessary to express an opinion upon it.

[1] 13 M. & W. 494.

[2] Cro. Jac. 73; Yelv. 67; Moore, 762.

NEGLIGENCE.

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Negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill.

The extent of this duty considered.

ACTION to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, under the following circumstances :—

The defendant was the owner of a dry dock used for the painting and repairing of vessels, and as incident to its being so used he supplied and put up the staging necessary to enable the outside of the vessel to be painted and repaired when in the dock, but after the staging had been handed over to the shipowner it no longer remained under the control of the defendant.

The plaintiff was a ship painter in the employ of one William Gray, a master painter, who had contracted with the owner of a vessel in the defendant's dock to paint the outside of the vessel, and on April 8, 1882, whilst the plaintiff was engaged in painting the vessel, and using for that purpose the staging which the defendant had put up on that same day, one of the ropes by which it was suspended from the vessel gave way, and the plaintiff fell in consequence into the dock and was injured.

The ropes had been supplied by the defendant as part of the machinery of the staging, and there was evidence that they had been scorched and were unfit for use with safety at the time the staging was put up, and that reasonable care had not been taken by the defendant as to their state and condition at that time.

The action was remitted for trial before the Bow County Court under s. 10 of the County-Court Act, 1867 (30 & 31 Vict. c. 142). The county-court judge gave judgement for the plaintiff for £20, the amount of damages agreed between the parties.

The Queen's Bench Division, on motion by way of appeal, ordered judgement to be entered for the defendant [1].

[1] L. R. 9 Q. B. D. 302.

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The plaintiff appealed.

The following judgements were delivered :—

BRETT, M. R.—In this case the plaintiff was a workman in the employ of Gray, a ship painter. Gray entered into a contract with a shipowner whose ship was in the defendant's dock to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting

have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made and to which it applies an exactly similar but a contract duty. We have not in this case to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation express or implied, which is a well-recognized head of law. The questions which we have to solve in this case are—What is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition. When two drivers or two ships are approaching each other such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought, by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care

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or skill, and injury ensue, the law, which takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word 'invitation' be used in its ordinary sense. By opening a shop you do not really invite, you do not ask *A. B.* to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention. And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premisses there must be a more remote and larger premiss which embraces both of the major

propositions. That, in the present consideration, is, as it seem to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognized cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and

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where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty.

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge* v. *Levy*[1]. It is not an easy case to act upon. It is not, it cannot be, accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated. And then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgement, which raises always a discussion depending entirely on the form of the declaration, and the effect on it of a verdict,

[1] 2 M. & W. 519; 4 M. & W. 337.

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in respect of which it is assumed that all questions were left to the jury. If this was the point taken the report of the evidence and of the questions left to the jury is idle! The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention in fact it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son. I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision, upon such a ground, in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgement, and in which the action might have been supported without proof of actual fraud. And this seems to be the meaning of Cleasby, B., in the observations he made on *Langridge* v. *Levy*[1] in the case of *George* v. *Skivington*[2]. In that case the proposition laid down in this judgement is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use. And certainly, if he or any one in his position had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold would endanger the personal safety of the wife.

In *Corby* v. *Hill*[3] it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff. And Willes, J., stated that the defendant had no right to set a trap for the plaintiff. But in the form of declaration suggested by Willes, J., on p. 567, there is no mention of allurement, or invitation, or trap. The facts suggested in that form are, 'that the plaintiff had licence to go on the road, that he was in consequence accustomed and likely to pass along it, that the defendant knew of that

[1] 2 M. & W. 519; 4 M. & W. 337.
[2] L. R. 5 Ex. 1, 5.
[3] 4 C. B. (N. S.) 556; 27 L. J. (C. P.) 318.

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custom and probability, that the defendant negligently placed slates in such a manner as to be likely to prove dangerous to persons driving along the road, that the plaintiff drove along the road, being by reason of the licence lawfully on the road, and that he was injured by the obstruction.' It is impossible to state a case more exactly within the proposition laid down in this judgement. In *Smith* v. *London and St. Katharine Docks Co.*[1], the phrase is again used of invitation to the plaintiff by the defendants. Again, let it be observed that there is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be, that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty. In *Indermaur* v. *Dames*[2], reliance is again placed upon a supposed invitation of the plaintiff by the defendant. But again it is hardly possible to state facts which bring a case more completely within the definition of the present judgement. In *Winterbottom* v. *Wright*[3], it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration. And the declaration does not seem to show that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff. The facts alleged did not bring the case within the proposition herein enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness. And it is as to too great a remoteness that the observation of Lord Abinger is pointed, when he says that the doctrine of *Langridge* v. *Levy*[4] is not to be extended. In *Francis* v. *Cockrell*[5] the decision is put by some of the judges on an implied contract between the plaintiff and the defendant.

[1] L. R. 3 C. P. 326.
[2] L. R. 1 C. P. 274; L. R. 2 C. P. 311.
[3] 10 M. & W. 109.
[4] 2 M. & W. 519; 4 M. & W. 337.
[5] L. R. 5 Q. B. 184 and 501.

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But Cleasby, B.[1], puts it upon the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons of whom the plaintiff was one. In other words he acts upon the rule above laid down. In *Collis* v. *Selden*[2], it was held that the declaration disclosed no duty. And obviously, the declaration was too uncertain. There is nothing to show that the defendant knew more of the probability of the plaintiff rather than any other of the public being near the chandelier. There is nothing to show that the plaintiff was more likely to be in the public-house than any other member of the public. There is nothing to show how soon after the hanging of the chandelier any one might be expected or permitted to enter the room in which it was. The facts stated do not bring it within the rule. There is an American case: *Thomas and Wife* v. *Winchester*[3], cited in Mr. Horace Smith's *Treatise on the Law of Negligence*, p. 88, note (t), which goes a very long way. I doubt whether it does not go too far. In *Longmeid* v. *Holliday*[4], a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule. If there was no fraud, the case was not brought by other circumstances within the rule. In *Gautret* v. *Egerton*[5], the declaration was held by Willes, J., to be bad on demurrer, because it did not show that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there *must be something like fraud*. He says: 'Every man is bound not wilfully to deceive others.' And then in the alternative, he says: '*or to do any act which may place them in danger*.' There seems to be no case in conflict with the rule above deduced from well-admitted cases. I am, therefore, of opinion that it is a good, safe, and just rule.

I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true, the proposition

[1] L. R. 5 Q. B. 515.
[2] L. R. 3 C. P. 495.
[3] 6 N. Y. 397 and *infra*, p. 408.
[4] 6 Ex. 761; 20 L. J. (Ex.) 430.
[5] L. R. 2 C. P. 371.

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must be true. If it be the rule the present case is clearly within it. This case is also, I agree, within that which seems to me to be a minor proposition—namely, the proposition which has been often acted upon, that there was in a sense an invitation of the plaintiff by the defendant, to use the stage. The appeal must, in my opinion, be allowed, and judgement must be entered for the plaintiff.

COTTON, L. J.—Bowen, L. J., concurs in the judgement I am about to read.

In this case the defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dock-owner as appurtenant to the dock and its use. After the stage was handed over to the ship-owner it no longer remained under the control of the dock-owner. But when ships were received into the dock for repair and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dock-owner was interested, and they, in my opinion, must be considered as invited by the dock-owner to use the dock and all appliances provided by the dock-owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed. That this obligation exists as regards articles of which the control remains with the dock-owner was decided in *Indermaur* v. *Dames*[1], and in *Smith* v. *London and St. Katharine Docks Co.*[2] the same principle was acted on. I think that the same duty must exist as to things supplied by the dock-owner for immediate use in the dock, of which the control is not retained by the dock-owner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in

[1] L. R. 1 C. P. 274; L. R. 2 C. P. 311. [2] L. R. 3 C. P. 326.

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relation to the repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dock-owner.

Blackmore v. *Bristol and Exeter Ry. Co.*[1] may be relied on as at variance with the opinion thus expressed by me, but I think that the objection is not well founded. If the plaintiff is to be considered as a volunteer there would be no implied request or invitation to him by the defendant to use the dock and the appliances provided. But he was there for the purpose of work, for the due execution of which the defendant received the ship into his dock, and the defendant received payment as remuneration for allowing the work to be done in his dock, and for providing the necessary appliances for enabling it to be done. The plaintiff was therefore engaged in work in the performance of which the defendant was interested, and he cannot be looked upon in the light of a volunteer. Whether the Court was right in *Blackmore's Case*[1] in treating the plaintiff as a volunteer may be a question. But as the ground of the decision is that he was so, that circumstance prevents the case being an authority inconsistent in principle with the conclusion at which I have arrived.

This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

Take for instance the case of *Langridge* v. *Levy*[2], to which the principle if it existed would have applied. But the judges who decided that case based their judgement on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases where the decision has been referred to judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in *Blackmore* v. *Bristol and Exeter Ry. Co.*[1]; and in *Collis* v. *Selden*[3], Willes, J., says that the judgement in *Langridge* v. *Levy*[2], was based on the fraud of the defendant. This impliedly negatives the existence of the larger general

[1] 8 E. & B. 1035.

[2] 2 M. & W. 519; 4 M. & W. 337.

[3] L. R. 3 C. P. 495.

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principle which is relied on, and the decisions in *Collis* v. *Selden*[1], and in *Longmeid* v. *Holliday*[2] (in each of which the plaintiff failed), are in my opinion at variance with the principle contended for. The case of *George* v. *Skivington*[3], and especially what is said by Cleasby, B., in giving judgement in that case seem to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Cleasby, B., on the ground that the negligence of the defendant which was his own personal negligence was equivalent, for the purposes of that action, to fraud on which (as he said) the decision in *Langridge* v. *Levy*[4] was based.

In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

For the reasons stated I agree that the plaintiff is entitled to judgement, though I do not entirely concur with the reasoning of the Master of the Rolls.

Judgement reversed.

NOTE.—The case of *Langridge* v. *Levy* (1837)[4] is so often referred to in this and other cases in connexion with the law as to negligence that it is thought desirable to include a report of it. It will be observed that the decision is based on the fraudulent representation made by the defendant to the father of the plaintiff which the Court assumed was intended to be passed on to the plaintiff. It is, therefore, difficult to see what real bearing it has upon the question of negligence.—[ED.]

LANGRIDGE *v.* LEVY.

CASE.—The declaration stated, that whereas one George Langridge, the father of the plaintiff, on June 1, 1833, at the request of the defendant, bargained with him to buy of him a certain gun, to wit, for the use of himself and his sons, at and for a certain price, to wit, the sum of £24, and the defendant then, by falsely and fraudulently warranting the said gun to

[1] L. R. 3 C. P. 495.
[2] 6 Ex. 761; 20 L. J. (Ex.) 430.
[3] L. R. 5 Ex. 1.
[4] 2 M. & W. 519; 4 M. & W. 337.

have been made by Nock, and to be a good, safe, and secure gun, then sold the said gun to the said George Langridge, for the use of himself and his sons, for the said sum of £24, then paid by the said George Langridge to the defendant for the same: whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by Nock, nor was it a good, safe, and secure gun, but, on the contrary thereof, was made and constructed by a maker very inferior as a gun-maker to Nock, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which premises the defendant, at the time of the making of the said warranty, and of the said sale, had full knowledge and notice. And the plaintiff in fact says, that he, knowing and confiding in the said warranty, did use and employ the said gun, which but for the said warranty he would not have done: and that afterwards, to wit, on December 10, 1835, the said gun being then in the hands and use of the plaintiff, by reason and wholly in consequence of the weak, dangerous and insufficient and unworkmanlike manufacture, construction, and materials thereof, then and whilst the said gun was so in use by the plaintiff, burst and exploded, became shattered, and went to pieces; whereby and by reason whereof the plaintiff was greatly cut, wounded, maimed, &c. &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost, and is for ever deprived of the use of his hand, &c. &c.

Pleas, first, not guilty; secondly, that the defendant did not warrant the said gun to be made by Nock, and to be a good, safe, and secure gun, in manner and form, &c.; thirdly, that the gun was not a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound, and of very inferior materials, as in the declaration alleged; fourthly, that the gun did not, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, burst, &c., as in the declaration alleged: on all which issues were joined.

At the trial before Alderson, B., at the Somersetshire Summer Assizes, 1836, it appeared that in June, 1833, the plaintiff's father saw in the shop of the defendant, a gun-maker in Bristol, a double-barrelled gun, to which was attached a ticket in these terms:—'Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV; cost 60 guineas: only 25 guineas.' He went into the shop, and saw the defendant, and examined the gun. The defendant (according to Langridge's statement) said he would warrant the gun to have been made by Nock for King George IV, and that he could produce Nock's invoice. Langridge told the defendant he wanted the gun for the use of himself and his sons, and desired him to send it to his house at Knowle, about two miles from Bristol, that they might see it tried. On the next day, accordingly, the defendant sent the gun to Langridge's house by his shopman, who also on that occasion warranted it to be made by Nock, and charged and fired it off

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several times. Langridge ultimately bought it of him for £24, and paid the price down. Langridge the father and his three sons used the gun occasionally; and in the month of December following, the plaintiff, his second son, having taken the gun into a field near his father's house to shoot some birds, putting in an ordinary charge, on firing off the second barrel, it exploded, and mutilated his left hand so severely as to render it necessary that it should be amputated. There was conflicting evidence as to the fact of the gun's being an insecure one, or of inferior workmanship. Mr. Nock, however, proved that it was not manufactured by him. The defendant also denied that any warranty had been given. The learned judge left it to the jury to say, first, whether the defendant had warranted the gun to be made by Nock, and to be a safe and secure one; secondly, whether it was in fact unsafe or of inferior materials or workmanship, and exploded in consequence of being so; and thirdly, whether the defendant warranted it to be a safe gun, knowing that it was not so. The jury found a general verdict for the plaintiff, damages £400.

In Michaelmas Term, Erle moved in pursuance of leave reserved by the learned judge, and obtained a rule *nisi* for arresting the judgement, on the ground that no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise: and that the injury did not arise so immediately from the defendant's act as that it could form the subject of an action on the case by the plaintiff, between whom and the defendant there was no privity of contract.

The judgement of the Court was delivered by

PARKE, B.—In this case a motion was made to arrest the judgement, after a verdict for the plaintiff. [His Lordship stated the declaration and proceeded]:—It is clear that this action cannot be supported upon the warranty as a *contract*, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it.

The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they

might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgement proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley* v. *Freeman*[1]; which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view *that the plaintiff should use the instrument* in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.

If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff* by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term *confiding*), used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not, indeed, averred, but it is stated that, by the act of the defendant, the

[1] 3 T. R. 51.

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property was transferred to the father, *in order* that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear.

We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

Rule discharged.

Affirmed in the Court of Exchequer Chamber, 4 M. & W. 337.

1866. INDERMAUR *v.* DAMES, L. R. 1 C. P. 274.

Where a person is invited upon the premises of another for purposes of lawful business, a special duty is cast upon the occupier to use reasonable care to prevent damage to such person from unusual danger thereon of which the occupier is or ought to be aware.

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The judgement of the Court (ERLE, C. J., WILLES, KEATING, and MONTAGUE SMITH, JJ.) was delivered by

WILLES, J.—This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for £400 damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgement, or for a new trial because of the verdict being against the evidence.

The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took

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time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gasfitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving: and, for the purpose of ascertaining whether such saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued, that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident: but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman: and the employment, and the implied authority resulting therefrom to test the apparatus,

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were not of a character involving personal preference (*dilectus personae*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him: see *Hounsell* v. *Smyth* [1].

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable, that, in the case of *Southcote* v. *Stanley* [2], upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the

[1] 7 C. B. (N. S.) 731; 29 L. J. (C. P.) 203.
[2] 1 H. & N. 247; 25 L. J. (Ex.) 339.

lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver: *Macarthy* v. *Younge* [1]. The case of the carboy of vitriol [2] was one in which this Court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour* v. *Maddox* [3], also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow servants, not however including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke* v. *Holmes* [4].

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually

[1] 6 H. & N. 329; 30 L. J. (Ex.) 227.
[2] *Farrant* v. *Barnes*, 11 C. B. (N. S.) 553; 31 L. J. (C. P.) 137.
[3] 16 Q. B. 326; 20 L. J. (Q. B.) 327.
[4] 7 H. & N. 937; 31 L. J. (Ex.) 356; and see *Bolch* v. *Smith*, 7 H. & N. 736; 31 L. J. (Ex.) 201.

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buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trapdoor left open, unfenced, and unlighted: *Lancaster Canal Company* v. *Parnaby*[1]; *per cur. Chapman* v. *Rothwell*[2], where *Southcote* v. *Stanley*[3] was cited, and the Lord Chief Justice, then Erle, J., said: 'The distinction is between the case of a visitor (as the plaintiff was in *Southcote* v. *Stanley*[3]), who must take care of himself, and a customer, who, as one of the public, is invited for purposes of business carried on by the defendant.' This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether

[1] 11 Ad. & E. 223; 3 P. & D. 162.
[2] E. B. & E. 168; 27 L. J. (Q. B.) 315.
[3] 1 H. & N. 247; 25 L. J. (Ex.) 339.

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there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson* v. *Fairrie*[1], relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling downstairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case; first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved, that, when the shaft was not in use, a fence might be resorted to without inconvenience: and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be, that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and,

[1] 1 H. & C. 633; 32 L. J. (Ex.) 73.

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as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved,—in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was there near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgement, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit.

The other arguments for the defendant, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence: but it would be wrong to grant a new trial, without a reasonable expectation that another jury might take a different view of the facts; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

Rule discharged.

This judgement was affirmed in the Court of Exchequer Chamber (KELLY, C. B., CHANNELL and PIGOTT, BB., BLACKBURN and MELLOR, JJ.). L. R. 2 C. P. 311.

NOTE.—Where a person undertakes gratuitously the *conveyance* of the person or goods of another he is bound to exercise due and reasonable care, and his duty is more extensive than that of merely not setting a trap as in the principal case: see *Harris* v. *Perry & Co.* 1903. 2 K. B. 219 (C. A.). —[ED.]

1862. HAMMACK *v.* WHITE, 31 L. J. (C. P.) 129; 11 C. B. (N. S.) 588.

The mere proof of the happening of an accident is not, as a general rule, sufficient evidence to support an action of negligence.

1862.

HAMMACK v. WHITE.

This was an action brought by the plaintiff, as administratrix of her late husband, William Hammack, in the Lord Mayor's Court, to recover damages for his death, alleged to have been occasioned by the negligence of the defendant.

The declaration stated that the deceased was lawfully passing a certain common and public highway, and that the defendant 'so carelessly, negligently, and improperly rode a certain vicious horse in the said highway that, by and through the carelessness, negligence and improper conduct of the defendant in that behalf,' the said horse ran with great force and violence upon the deceased, and killed him. The defendant pleaded not guilty.

The action was tried, before the Recorder, and it appeared at the trial that the deceased was walking on the pavement, in Finsbury Circus, and that the defendant was riding a horse which he had bought at Tattersall's the day before, and that he had taken it out to try it. The account of the accident as it appeared on the judge's notes, was very meagre, and in substance it was as follows: One witness stated that he saw the defendant riding the horse in East Street shortly before the accident; that the horse was then very restive, and that the defendant had the reins very tight, and was patting the horse. Another witness stated that he also met the defendant shortly before the accident; that the horse was then walking, but was beginning to get restive. A third witness stated, that just before the accident the horse passed very quickly by him; but that, as far as he could see, there was nothing which the defendant could have done at that time to prevent the accident which he did not do. And the only other witness stated that he saw the accident, and that the deceased was knocked down by the horse on the pavement, close to the area railings.

Upon these facts the Recorder non-suited the plaintiff, on the ground that there was no evidence of negligence on the part of the defendant.

Patchett, in Michaelmas Term, obtained a rule to show cause

1862.

HAMMACK v. WHITE.

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why this nonsuit should not be set aside, and a new trial had, on the ground that this direction of the Recorder was wrong.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is an action for negligence; and the question is, whether there is on the notes of the Recorder any evidence of negligence which ought to have been left to the jury. Now, it is quite clear that the plaintiff is not entitled to have his case submitted to a jury, unless he gives some affirmative evidence of negligence in the defendant. The negligence imputed here is either the unskilful management of the horse, or imprudence in taking a vicious horse into the public street. The evidence is, that the defendant was riding the horse at a walk, when the animal became restive, and though the defendant did all that he could, he was overpowered, and the horse ran on to the pavement and killed the husband of the plaintiff. I can see here no affirmative evidence whatever of any want of skill on the part of the defendant. Then is there any evidence of a culpable want of prudence in the defendant in bringing the horse into a public street? I can see none. The horse was bought the day before, and the defendant was out trying his new purchase himself. It is said that this itself was negligence, and that he ought to have ascertained the temper of the animal before he tried it. But I do not think so. There is not the slightest evidence that the defendant had any knowledge whatever of the vicious character of the horse, and he must be presumed, therefore, to have been entirely ignorant of it. And I do not think that riding a horse of which a man has himself had no experience in a public street is sufficient evidence on which to rest an action for negligence.

WILLES, J.—I am of the same opinion. At first I was inclined to doubt, but after the discussion which has taken place I am convinced that there is here no evidence of negligence. The circumstance which weighed with me in the first instance was, that there was here a man riding on the footway, and, therefore, primâ facie he was in the wrong. But the witness who proves this, also proves in the same breath that the horse was running away, and that the defendant was doing his best to prevent the accident; the defendant was, therefore, clearly carried on to the pavement against his

will. The being on the footpath, therefore, is in itself no evidence of negligence, and only shows that the horse was an unmanageable one. But riding an unmanageable horse in the public street is not in itself negligence; it must be shown that the defendant was acquainted with the character of the animal. The evidence excludes any want of care on the part of the rider, but it is said that there was want of skill. But what evidence is there of that? None whatever which in the least preponderates in favour of that view. Lastly, it is said that the defendant ought to have tried this horse in some private place before he rode him in a public street. That, however, would be a most unreasonable restriction on the right of the public, and one not warranted by law. The defendant, not having any reason to suppose that the horse was a dangerous one, had a perfect right to ride him where he liked.

There is one other point to which I should wish to advert, namely, whether the same considerations would apply to an indictment for manslaughter. It is laid down in 1 East, P. C. 264, that 'whoever seeks to excuse himself for having unfortunately occasioned by any act of his own the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are most accustomed to do.' Of course it makes no difference whence the evidence comes, whether from the party accused or the party complaining of the negligence, if it is shown that the homicide is excusable. But, as at present advised, I do not think that a jury ought to be told in a civil action that the question is the same as an indictment for manslaughter.

WILLIAMS and KEATING, JJ., concurred.

Rule discharged.

1865. SCOTT *v.* THE LONDON DOCK COMPANY, 34 L. J. Ex. 220 (Ex. Ch.); 3 H. & C. 596.

Where damage is caused by an object under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, a presumption arises, in the absence of explanation by the defendant, that the accident was due to negligence. [*Res ipsa loquitur.*]

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This was an appeal by the defendants against the decision of the majority of the Court of Exchequer, making absolute a rule for a new trial in an action for an injury to the plaintiff.

The plaintiff, the only witness, stated in his evidence, that as he, in the exercise of his duty as a custom-house officer, was passing under a doorway on the defendants' premises, some bags of sugar fell on him from a crane which was fixed over the doorway. The defendants offered no explanation of the cause of the bags falling. Martin, B., directed a verdict for the defendants, on the ground that there was no evidence of negligence; the Court of Exchequer, however (Martin, B., *dissentiente*, Pollock, C. B., *dubitante*), granted a new trial.

Field (Murphy with him), for the appellants, the defendants.—There was no evidence of negligence to maintain the action. The accident happened not in a public street, where the public have a right of way, but on the private premises of the defendants. No doubt the plaintiff was lawfully there, and the bags of sugar were dropped by the defendants' servants. If the evidence is as consistent with the accident not being caused by the negligence of the defendants' servants as with its being caused by their negligence, there is no evidence for the jury. So if the evidence is as consistent with the fact that the plaintiff by his negligence was contributory to the accident as with his not being contributory to it, there is no evidence for the jury, even if there was some evidence of negligence on the part of the company's servants: *Cotton* v. *Wood*[1], *Hammack* v. *White*[2], *Cooke* v. *Waring*[3], *Cornman* v. *the Eastern Counties Railway Company*[4], *Wilkinson* v. *Fairrie*[5] and *Bolch* v. *Smith*[6].

[CROMPTON, J.—There is great difficulty in applying the rule of evidence being equally consistent with either view to cases of negligence. How can a judge say whether the evidence is equally consistent with negligence or no negligence? BLACKBURN, J.—Does not the nature of the accident decide whether the fact of the

[1] 8 Com. B. Rep. (N. S.) 568; S. C. 29 L. J. (C. P.) 333.
[2] 11 Ibid. 676; S. C. 31 L. J. (C. P.) 129.
[3] 2 H. & C. 332; S. C. 32 L. J. (Exch.) 262.
[4] 4 Hurl. & N. 181; S. C. 29 L. J. (Exch.) 94.
[5] 32 L. J. (Exch.) 73.
[6] 7 Hurl. & N. 736; S. C. 31 L. J. (Exch.) 201.

accident is evidence of negligence? If a ship goes down at sea, and no one can tell whether it sunk by reason of a storm or by reason of the negligence of the crew, the evidence in that case would be equally consistent with either view. But if a ship goes out of harbour, and after it has got a very short distance sinks in a perfectly smooth sea, I think this would, as it has been held, be some evidence that the ship was not seaworthy.]

There must be affirmative evidence of negligence. The plaintiff ought to have explained and detailed the circumstances more. His evidence is ambiguous. He only says the bags fell on him. The bags may have been lowered in the ordinary way, or the sudden illness of a workman might have caused the accident, or some one for whom the defendants were not responsible might have let the bags down.

[CROMPTON, J.—The plaintiff often can give little evidence how the accident was caused. The power of explanation generally lies with the defendant.]

The plaintiff was guilty of contributory negligence in not looking about him.

[CROMPTON, J.—Is it not a question for the jury whether he was negligent?]

Byrne v. *Boadle*[1], relied on by two of the judges below, is distinguishable. There the barrel rolled out of the window and into a public highway. Here the bags are not shown to have rolled out, and the place was not a highway, where the right of the public to pass in safety is paramount to the right of the individual to use his warehouse. If *Byrne* v. *Boadle*[1] is not distinguishable, it is contended that it is bad law.

Sir R. P. Collier (Solicitor-General), T. Jones with him, for the respondent, the plaintiff.—In many cases of a complicated state of facts, it is impossible for the judge to say whether the evidence for and against negligence is equal. The facts proved here are more consistent with negligence on the part of the defendants' servants than with the absence of it. In many cases, and in this case, the very happening of the accident is evidence of negligence. It must be considered what evidence the plaintiff can be reasonably

[1] 2 H. & C. 722; s.c. 33 L. J. (Exch.) 13.

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expected to give. The rule of pleading, that the party who has peculiar means of knowledge must plead with greater particularity than the other, is founded on good sense, and may guide in determining the rule with respect to the evidence to be required. In *Christie* v. *Griggs*[1], where the coach overset, Mansfield, C. J., said that, on proof being given of the accident, the plaintiff had proved enough; and that it lay on the defendant to prove that the coach was well built, and the coachman a skilful driver. So also in *Skinner* v. *The London, Brighton and South Coast Railway Company*[2] it was decided that a collision between two trains of the same company was primâ facie evidence of negligence on the part of the company, and that it was not necessary for the plaintiff to prove what specific act of negligence caused the injury; and that if the accident arose from some inevitable or extraordinary cause, it lay on the defendants to prove it. Here the bags fall on the plaintiff; that is something out of the ordinary course of business. The dock company or their servants can tell, if they choose, how the bags fell: whether they rolled out of the warehouse; whether they were negligently fastened by a chain. The absence of explanation is matter for the jury. The case proved of bags suddenly and violently falling on a man from a warehouse is more consistent with the fact that they fell by negligence than that they fell without it. A machine is used for the very purpose of preventing the bags falling. (He was stopped by the Court.)

ERLE, C. J.—The majority of the Court have come to the following conclusions: there must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. We all assent to the principle laid down in the cases cited for the defendants, but the judgement turns upon the construction to be put on the judge's notes. As my Brother Mellor and myself read them, we cannot find that reasonable evidence of the want of care which seems apparent to the rest of the Court. The judgement of the Court below is therefore

[1] 2 Camp. 79. [2] 5 Exch. Rep. 787; s. c. 19 L. J. (Exch.) 162.

affirmed, and the case must go down to a new trial, when the real effect of the evidence will in all probability be more correctly ascertained.

Judgement affirmed.

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NOTE.—In *Manzoni* v. *Douglas* [1880][1], Denman and Lindley, JJ., approved the decision in *Hammack* v. *White* (*supra*), and said that it was not inconsistent with *Scott* v. *London Dock Company*—Denman, J., pointing out that there was a distinction between the case of an accident caused by an inanimate object, such as a bale of goods, and one caused by the misconduct of an animate creature.—[ED.]

1858. TUFF *v.* WARMAN (Ex. Ch.): 5 C. B. (N. S.), 573; S. C. 27 L. J. (C. P.), 322.

In an action for negligence the plaintiff cannot succeed if his own negligence was the decisive cause of the accident. A defendant, however, will not be excused if, notwithstanding negligence on the part of the plaintiff, he might, by the exercise of ordinary care, have avoided the mischief which happened.

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TUFF v. WARMAN.

This was an appeal from a decision of the Court of Common Pleas discharging a rule for a new trial (moved on the ground of misdirection and that the verdict was against evidence) in an action against the defendant, a Trinity House pilot, for negligently navigating a steam-vessel called the *Celt* in the river Thames, and running against and damaging the plaintiff's barge, the *Nancy*.

The cause was tried before Willes, J., at the sittings in London after Hilary Term, 1857, when a verdict was found for the plaintiff for £106.

At the time the collision took place, the *Nancy* was sailing down the river with a fair wind; and the *Celt* was steaming up the river.

From the evidence of the plaintiff's witnesses, it appeared that there were only two persons on board the *Nancy*, one of whom was occupied in washing the deck, and the other steering—the latter being in such a position as not to be able to see ahead (the sail being in the way) without stooping, that he had seen the *Celt* when more than half a mile off, as he stated, on the south side of the river, and that when he so saw her there was no likelihood

[1] L. R. 6 Q. B. D. 145.

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of her coming into collision with the barge; that he had not seen her again until just before the collision, when he said he ported his helm, but that it was then too late to alter the course of the barge. He stated, that, if he had seen the steamer a few minutes before, he should have ported his helm, but that he should not have avoided the collision by porting his helm five minutes before; and that there was plenty of room on each side for the steamer to pass.

Two seamen who were in another vessel were called by the plaintiff, and stated that the *Celt* was about the middle of the river, but nearer to the north than to the south shore; that the *Celt* and the *Nancy* were for a quarter of a mile or more before the collision in a direct line; that the *Celt* did not port her helm; and that there was no difficulty in the steamer passing the *Nancy* on either side.

On the part of the defendant, witnesses were called to prove that the defendant was only one fourth of the width of the river from the north bank of the river; that he was keeping a look-out, and that he could not see whether any one was looking out on the barge; that, several minutes before the collision, he directed the helm of the *Celt* to be ported, and that this direction was obeyed; that this was done in time to avoid the collision, had the *Nancy* at the same time ported her helm also, or if she had even kept on her course; but that her steersman had starboarded his helm instead of porting it.

A number of pilots were called for the purpose of proving that the defendant acted properly under the circumstances of the case: and they stated that they thought it would be the duty of the defendant to port his helm: and two of them said that it was the duty of the defendant to port his helm, whatever the consequences might be.

In his summing-up the learned judge told the jury that the plaintiff was not entitled to recover if it was an accident, or if the plaintiff by his negligence had directly contributed to the accident; and that, if the injury was occasioned by the negligence of both parties, the plaintiff had no remedy: and he asked the jury whether they thought the absence of look-out was an act of negligence on the part of the plaintiff; and, if so, they would have to take it into consideration in deciding whether, nothwithstanding that, the defendant was liable: and he further told them,

that, if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, then they were liable, though there was no look-out on the other vessel, for that would not be the direct cause of the injury: and he referred to the case of *Davies* v. *Mann* [1], by way of illustration. The learned judge further told the jury, that, if they thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover.

In the following Easter Term, a rule was obtained on the part of the defendant calling upon the plaintiff to show cause why there should not be a new trial, on the ground that the learned judge had misdirected the jury, in this, that he ought to have told them, that, if the plaintiff by his negligence contributed to the occasioning of the accident, he could not recover, whether he contributed directly or indirectly; and that, even assuming negligence on the defendant's part, the plaintiff could not recover, if he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence; and that he should further have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover.

Cause was shown against this rule in Trinity Term, 1857, and the rule was discharged; but leave was given to the defendant to appeal.

If the Court should be of opinion that the objections made to the ruling of the learned judge are unsustainable, the judgement below is to stand: if not, the judgement below is to be reversed, and a new trial ordered.

The case was argued on May 10, 1858, before Wightman, J., Erle, J., Crompton, J., Watson, B., Bramwell, B., and Channell, B.

Collier, Q.C. (with whom was Digby Seymour), for the defendant.—The plaintiff's own evidence shows that there was

[1] 10 M. & W. 546.

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manifest negligence on his part. [WIGHTMAN, J.—The only question we have to consider, is, whether the summing-up was correct.] The learned judge should have told the jury, that, if the plaintiff by the exercise of ordinary care on his part could have avoided the collision, he was not entitled to recover, and that the evidence showed an entire absence of due care on his part. The law upon this subject was very much considered in *Butterfield* v. *Forrester*[1]; speaking of which case, Parke, B., in *Bridge* v. *The Grand Junction Railway Company*[2], says: 'The law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*[1]; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong.' That was followed by *Davies* v. *Mann*[3], where the same learned judge says: 'It appears to me that the correct rule concerning negligence is laid down in *Bridge* v. *The Grand Junction Railway Company*[2], namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence.' That case (*Davies* v. *Mann*[3]) is supportable on this ground, that, although the plaintiff was guilty of negligence in tethering the donkey and leaving it on the highway, he had no control over it at the time, so as to be able by the exercise of ordinary care to avoid the injury. This is not the case of a barge moored in the river, but of a vessel navigated by persons who may be presumed to know the statutory regulations, and of whom it may fairly be assumed that they will obey them. The rule of law is also affirmed in *Clayards* v. *Dethick*[4]; where it was laid down, that, in an action for damage occasioned by the defendant's negligence, a material question is, whether or not the plaintiff might have escaped the damage by ordinary care on his own part: but the defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger: the amount of danger, and the circumstances which led the plaintiff to incur it,

[1] 11 East, 60
[2] 3 M. & W. 244.
[3] 10 M. & W. 546.
[4] 12 Q. B. 439.

are for the consideration of the jury. That question was not at all submitted to the jury here. [WIGHTMAN, J.—The plaintiff may have been guilty of some negligence, and still it may not have contributed to the loss.] It should have been left to the jury to say whether the plaintiff had been guilty of negligence; and that would in a great measure be determined by the consideration whether he could by the exercise of ordinary care have avoided the accident. [WIGHTMAN, J.—Even though it was impossible that that negligence could have contributed to the accident! WATSON, B.—The usual way of leaving such a question, I believe, has been —Was the plaintiff guilty of negligence? and, did that negligence contribute to the injury complained of?] This is not a case of antecedent negligence on one side or the other, but of concurrent negligence on the part of both. The plaintiff was not entitled to recover, if he might by the exercise of ordinary care have avoided the collision. The next question is, whether the learned judge ought not to have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover. In this case, it was quite clear that the plaintiff kept no look-out, and that he was guilty of negligence: as to that there was no conflict of evidence. [WIGHTMAN, J.—We have nothing to do with the evidence. The question is, whether the direction of my Brother Willes was correct in point of law. The main objection here seems to be the use of the word 'directly.' If by the exercise of ordinary care the plaintiff might have prevented the injury, he contributes to it, and therefore cannot recover. CROMPTON, J.—The plaintiff cannot by his negligence cast upon the defendant the necessity of using extraordinary care. It is not enough to say that the defendant has been negligent: but it is no answer to say that the plaintiff has been negligent also, unless you go on to show, that, but for the plaintiff's negligence, the accident would not have happened, or might have been avoided.]

J. Wilde, Q.C. (with whom was Honyman), *contra*.—The summing-up of the learned judge was perfectly unexceptionable. In substance, he tells the jury that the plaintiff is not entitled

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to recover if he by his negligence directly contributed to the accident, or if the injury was occasioned by the negligence of both,—that, if they thought the absence of look-out was an act of negligence on the part of the plaintiff, they must take that into consideration in deciding whether, notwithstanding that, the defendant was liable,—that, if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, they were liable though there was no look-out on the other vessel, for that (the want of look-out on the last-mentioned vessel) would not be the direct cause of the injury: and he concludes by saying, that, if the jury thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover. If there has been an antecedent act of negligence in the one party, the question arises whether the other might not by the exercise of ordinary care and skill have avoided the consequences. For instance, a man lies down to sleep on a highway: that is an antecedent act of negligence on his part; but it will not justify another in negligently driving over him. The real question in these cases is,—Was the injury brought about by the negligence, direct or indirect, of the plaintiff? If it was, he is not entitled to recover. The jury were told that they must find for the defendant if they thought the accident was partly caused by the plaintiff's own negligence. The word 'directly' was not used as contradistinguished from 'indirectly.' The jury had already been instructed as to the sense in which that expression was to be understood. [CROMPTON, J.—The word 'contribute' is a very unsafe word to use: it is much too loose.]

WIGHTMAN, J., now delivered the judgement of the Court.—It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the

misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.

This appears to be the result deducible from the opinion of the judges in *Butterfield* v. *Forrester* [1]; *Bridge* v. *The Grand Junction Railway Company* [2]; *Davies* v. *Mann* [3]; and *Dowell* v. *The General Steam-Navigation Company* [4].

In the present case, the main objection taken to the summing-up was, that the judge left to the jury whether the plaintiff by his negligence '*directly*' contributed to the misfortune; and it was contended, for the defendant, that, whether he directly or indirectly contributed, was immaterial, if he contributed to it by his negligence at all. But the direction to the jury must have reference to the evidence in the case; and, taking the whole summing-up together, in connexion with the evidence, we do not think that the jury could have been misled by the use of the word 'directly.' The learned judge told the jury, that, if the absence of a look-out was negligence on the part of the plaintiff, still, if the defendant also had a look-out, and nevertheless persisted in a course that would inflict an injury, he would be liable, though the plaintiff had no look-out; for that neglect of the plaintiff would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened.

In this, which seems to be the obvious sense in which the word 'direct' was used, we do not think there was any misdirection; and, in other respects, the summing-up does not appear to be objectionable, according to the rules to be adduced from the authorities referred to.

Upon the whole, then, we are of opinion that the judgement should be affirmed.

Judgement affirmed.

[1] 11 East, 60.
[2] 3 M. & W. 246.
[3] 10 M. & W. 548.
[4] 5 E. & B. 206.

1858. This statement of the law was approved by the House of Lords in *Radley* v. *London and North-Western Railway Company* (1876)[1].

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1887. 'THE BERNINA,' L. R. 12 P. D. 58 (C. A.).

MILLS *v.* ARMSTRONG.

A plaintiff is not precluded from succeeding in an action for negligence by reason only of the contributory negligence of a third party who is not either his servant or his agent.

1887. Appeal from a judgement of Butt, J.[2], on a special case stated for the opinion of the Court in three actions brought *in personam* against the owners of the steamer *Bernina*. The first action was brought by the personal representative of J. H. Armstrong, an engineer on board the steamer *Bushire*, which came into collision with the *Bernina*. Through the collision Armstrong was drowned. The collision was caused through the fault of the master and crews of both vessels, but Armstrong had nothing to do with the navigation of the *Bushire*.

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The second action was brought by the personal representative of Owen, the second officer on the *Bushire*, who was directly responsible for the negligent navigation of the *Bushire*, and who was drowned.

The third action was brought by the personal representative of Toeg, a passenger on the *Bushire* at the time of the collision, and who was drowned.

Butt, J., held on the authority of *Thorogood* v. *Bryan*[3], that the plaintiffs were unable to recover against the defendants, and dismissed the actions.

The plaintiffs appealed.

LINDLEY, L. J.—This was a special case. Three actions are brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the *Bushire*, against the owners of the *Bernina*. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons (Toeg) was a passenger on the *Bushire*; one (Armstrong) was an engineer of the ship, though not to blame for the collision. The third (Owen)

[1] L. R. 1 App. Cas. 754. [2] Reported L. R. 11 P. D. 31.
[3] 8 C. B. 115.

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was her second officer, and was in charge of her, and was himself to blame for the collision. The questions for decision are, whether any, and, if any, which of these actions can be maintained; and if any of them can, then whether the claims recoverable are to be awarded according to the principles which prevail at common law, or according to those which are adopted in the Court of Admiralty in cases of collision. In order to determine these questions it is first necessary to consider the statute on which the actions are founded, for it must not be forgotten that such actions as these could not be brought at common law, neither could they be maintained in the Court of Admiralty before that Court became a branch of the High Court by virtue of the Judicature Acts of 1873 and 1875. The provision of Lord Campbell's Act as to damages (9 & 10 Vict. c. 93, ss. 1, 2), was wholly inapplicable to the Court of Admiralty when the Act was passed. At that time no action for damages in the then technical sense of the expression could be brought in the Court of Admiralty. Moreover, that Court did not consist of a judge and jury, nor had it any machinery for summoning juries by whom damages could be assessed, or by whom damages could be divided amongst persons beneficially entitled to them by the statute. Although, therefore, actions under Lord Campbell's Act can now be brought in the Admiralty Division of the High Court, it is plain that the damages must be assessed by a jury, as directed by the statute, and not by the judge, with or without other assistance, according to the rules which are usually applied in that Court in cases of collision. When the Judicature Acts passed, the Court of Admiralty had no rules applicable to actions brought under Lord Campbell's Act, simply because that Court had no jurisdiction to try such cases. It follows as a consequence that, whether we regard the right to sue, or whether we regard the damages to be recovered in actions founded on Lord Campbell's Act, it is impossible to comply with clause 9 of s. 25 of the Judicature Act of 1873. It is manifest that this clause in the Judicature Act has no application to such actions, although it does apply to ordinary actions for collision at sea.

Having cleared the ground thus far, it is necessary to return to the statute and see under what circumstances an action upon it can be supported. The first matter to be considered is whether there has been any such wrongful act, neglect, or default of the defendants

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as would, if death had not ensued, have entitled the three deceased persons respectively to have sued the defendants. Now, as regards one of them, namely, Owen, the second officer, who was himself to blame for the collision, it is clear that, if death had not ensued, he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable. It follows, therefore, that his representatives can recover nothing under Lord Campbell's Act for his widow and children, and their action cannot be maintained. The other two actions are not so easily disposed of. They raise two questions: (1) Whether the passenger Toeg, if alive, could have successfully sued the defendants; and, if he could, then (2) whether there is any difference between the case of the passenger and that of the engineer Armstrong. The learned judge whose decision is under review felt himself bound by authority to decide both actions against the plaintiffs. The authorities which the learned judge followed are *Thorogood* v. *Bryan*[1], and *Armstrong* v. *Lancashire and Yorkshire Railway Company*[2]; and the real question to be determined is whether they can be properly overruled or not. *Thorogood* v. *Bryan*[1] was decided in 1849, and has been generally followed at Nisi Prius ever since, when cases like it have arisen. But it is curious to see how reluctant the Courts have been to affirm its principle after argument, and how they have avoided doing so, preferring, where possible, to decide cases before them on other grounds: see, for example, *Rigby* v. *Hewitt*[3]; *Greenland* v. *Chaplin*[4]; *Waite* v. *North-Eastern Railway Company*[5]. I am not aware that the principle on which *Thorogood* v. *Bryan*[1] was decided has ever been approved by any court which has had to consider it. On the other hand, that case has been criticized and said to be contrary to principle by persons of the highest eminence, not only in this country but also in Scotland and in America. And while it is true that *Thorogood* v. *Bryan*[1] has never been overruled, it is also true that it has never been affirmed by any court which could properly overrule it, and it cannot be yet said to have become indisputably

[1] 8 C. B. 115. [2] L. R. 10 Ex. 47. [3] 5 Ex. 240.
[4] 5 Ex. 243. [5] E. B. & E. 719.

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settled law. I do not think, therefore, that it is too late for a Court of Appeal to reconsider it, or to overrule it if clearly contrary to well-settled legal principles.

Thorogood v. *Bryan*[1] was an action founded on Lord Campbell's Act. The facts were shortly as follows. The deceased was a passenger in an omnibus, and he had just got off out of it. He was knocked down and killed by another omnibus belonging to the defendants. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendants, and there does not seem to have been any reason why the Court should have disallowed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled the Court to grant a new trial whether any injustice had been done or not; and, accordingly, the plaintiff moved for a new trial on the ground of misdirection, and it is with reference to this point that the decision of the Court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus out of which he was getting. The last direction was complained of, but was upheld by the Court. The *ratio decidendi* was that if the death of the deceased was not occasioned by his own negligence it was occasioned by the joint negligence of both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of the driver. Maule, J., puts it thus: 'The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased.' This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain, nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were

[1] 8 C. B. 115.

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negligent, and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in *Thorogood* v. *Bryan* [1] is, to me, quite unintelligible. It is, in truth, a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, e. g. to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the Court never meant. All the Court meant to say was that for purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public, to take him up; and such selection, if selection it can be called, does not create the relation of principal and agent or master and servant between the passenger and the driver; the passenger knows nothing of the driver and has no control over him; nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, or employed by the owner of the vehicle he drives or by some other person who lets the vehicle to him. The orders he obeys are his employer's orders. These orders, in the case of an omnibus, are to drive from such a place to such a place and take up and put down passengers: and in the case of a cab the orders are to drive where the passenger for the time being may desire to go, within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression, that the passenger identifies himself with the driver, but no such interference was suggested in *Thorogood* v. *Bryan* [1]. The principles of the law of negligence, and in particular of what is called contributory negligence, have been discussed on many occasions since that case was decided, and are much better understood now than they were thirty years ago. *Tuff* v. *Warman* [2] in the Exchequer Chamber, and *Radley* v. *London and North-Western Railway Company* [3] in the House of Lords, show the true grounds on

[1] 8 C. B. 115. [2] 5 C. B. (N. S.) 573.
[3] L. R. 1 App. Cas. 754.

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which a person himself guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by *A.* against *B.* for injury directly caused to *A.* by the want of care of *A.* and *B.* will not lie. As Pollock, C. B., pointed out in *Greenland* v. *Chaplin*[1], the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can show that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shown not only by *Tuff* v. *Warman*[2] and *Radley* v. *London and North-Western Railway Company*[3], but also by the well-known case of *Davies* v. *Mann*[4] and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes as follows:—

1. *A.* without fault of his own is injured by the negligence of *B.*, then *B.* is liable to *A.* 2. *A.* by his own fault is injured by *B.* without fault on his part, then *B.* is not liable to *A.* 3. *A.* is injured by *B.* by the fault more or less of both combined, then the following further distinctions have to be made:—(*a*) if, notwithstanding *B.*'s negligence, *A.* with reasonable care could have avoided the injury, he cannot sue *B.*: *Butterfield* v. *Forrester*[5]; *Bridge* v. *Grand Junction Railway Company*[6]; *Dowell* v. *General Steam Navigation Company*[7]; (*b*) if, notwithstanding *A.*'s negligence, *B.* with reasonable care could have avoided injuring *A.*, *A.* can sue *B.*: *Tuff* v. *Warman*[2]; *Radley* v. *London and North-Western Railway Company*[3]; *Davies* v. *Mann*[4]; (*c*) if there has been as much want of reasonable care on *A.*'s part as on *B.*'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, *A.* cannot sue *B.* In such a case *A.* cannot with truth say that he has been injured by *B.*'s negligence, he can only with truth say that he has been injured by his own carelessness and *B.*'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of

[1] 5 Ex. 243.
[2] 5 C. B. (N. S.) 573.
[3] L. R. 1 App. Cas. 754.
[4] 10 M. & W. 546.
[5] 11 East, 60.
[6] 3 M. & W. 244.
[7] 5 E. & B. 195.

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decisions already referred to. But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled, and not open to judicial discussion. If now another person is introduced the same principles will be found applicable. Substitute in the foregoing cases *B.* and *C.* for *B.*, and unless *C.* is *A.*'s agent or servant there will be no difference in the result except that *A.* will have two persons instead of one liable to him. *A.* may sue *B.* and *C.* in one action, and recover damages against them both; or he may sue them separately and recover the whole damage sustained against the one he sues: *Clark* v. *Chambers* [1], where all the previous authorities were carefully examined by the late L. C. J. Cockburn. This is no doubt hard on the defendant, who is alone sued, and this hardship seems to have influenced the Court in deciding *Thorogood* v. *Bryan* [2]. In that case the Court appears to have thought it hard on the defendant to make him pay all the damages due to the plaintiff, and that it was no hardship to the plaintiff to exonerate the defendant from liability, as the plaintiff had a clear remedy against the master of the omnibus in which he was a passenger. But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong and of throwing the whole liability on some one who was no more to blame than he. The injustice to the defendant, which the Court sought to avoid, is common to all cases in which a wrong is done by two people and one of them alone is made to pay for it. The rule which does not allow of contribution among wrongdoers is what produces hardship in these cases, but the hardship produced by that rule (if really applicable to such cases as these under discussion) does not justify the Court in exonerating one of the wrongdoers from all responsibility for his own misconduct or the misconduct of his servants. I can hardly believe that if the plaintiff in *Thorogood* v. *Bryan* [2] had sued the proprietors of both omnibuses, it would have been held that he had no right of action against one of them. Having given my reasons for my inability to concur in the doctrine laid down in *Thorogood* v. *Bryan* [2], I proceed to consider how far that doctrine is supported by other authorities. The Court, in deciding *Thorogood* v. *Bryan* [2], considered that they were following *Bridge* v. *Grand Junction Railway Company* [3]. In

[1] L. R. 3 Q. B. D. 327.
[2] 8 C. B. 115.
[3] 3 M. & W. 244.

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that case a passenger in one train sued the owners of another train for an injury caused by a collision between the two trains. The defendants pleaded that the collision was caused in part by the negligence of the persons who had the management of the train in which the plaintiff was. The Court held the plea bad, both in substance and in form, because the plea did not state that those who had the management of the plaintiff's train could with ordinary care have avoided the collision; and that even assuming the negligence pleaded to be proved the plea was bad on the authority of *Butterfield* v. *Forrester*[1], which was and still is a perfectly sound decision. When *Bridge* v. *Grand Junction Railway Company*[2] is carefully looked at, it will be found to be no authority for the doctrine laid down in *Thorogood* v. *Bryan*[3]. I cannot find in *Bridge* v. *Grand Junction Railway Company*[2] any authority for the proposition that the negligence of the driver of an omnibus or railway train is for any purpose to be regarded as the negligence of the passengers in it. Nor is there any case prior to *Thorogood* v. *Bryan*[3] which warrants any such proposition. *Vanderplank* v. *Miller*[4], which was relied on as an earlier authority, is very shortly reported. The plaintiff was the owner of goods on board the *Louisa*, and he sued the owners of another ship, which ran into and sank the *Louisa*, for the loss of the goods. The plaintiff obtained a verdict, but Lord Tenterden told the jury that if there was fault on both sides the plaintiff could not recover, to enable him to do so the accident must be attributable entirely to the fault of the defendants. This direction cannot be properly understood without knowing more of the facts and pleadings of the case. For anything that appears to the contrary the plaintiff may have been the owner or charterer of the *Louisa*, and the employer of those on board of her: or the declaration may have been so drawn as to account for the direction that the plaintiff could not succeed unless the accident was attributable entirely to the fault of the crew of the defendant's ship. I cannot regard this case as an earlier illustration of the principle laid down in *Thorogood* v. *Bryan*[3], nor is the relation between bailor and bailee an element in the class of cases now under consideration, and to decide this case on principles applicable to bailments of goods would be to proceed on a misleading analogy. *Waite* v. *North-*

[1] 11 East, 60.
[2] 3 M. & W. 244.
[3] 8 C. B. 115.
[4] Moo. & M. 168.

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Eastern Railway Company [1] is materially different from *Thorogood* v. *Bryan* [2], and was decided on a different and perfectly sound principle. The plaintiff was a child in the care of her grandmother, who had taken tickets for herself and the child to go by a train belonging to the defendant company. The plaintiff was injured in consequence of the want of care of her grandmother quite as much as by the negligence of the defendants, and it was very properly held that the defendants were not liable. There was no duty or obligation on the part of the defendants to take more care of the plaintiff than of grown-up persons, the defendants had a right to expect that proper care would be taken of the child, and if such care had been taken there would have been no accident. The plaintiff sued both in contract and in tort, but the same principle applied to both aspects of the case. In *Waite's Case* [1] Bramwell, B., said he thought that *Thorogood* v. *Bryan* [2] was rightly decided but on wrong reasoning; but the importance of the case turns entirely on the reasoning, and Bramwell, B., himself when he gave his judgement in *Waite's Case* [1] preferred to rest his decision not on *Thorogood* v. *Bryan* [2], but on the ground on which the other members of the Court decided it, as already mentioned. *Child* v. *Hearn* [3] and *Armstrong* v. *Lancashire and Yorkshire Railway Company* [4] are the only other cases which require notice. In the former the plaintiff was in the employment of a railway company, whose duty it was to fence its line. The defendant was the owner of some pigs which had got through the fence and upset a trolley, whereby the plaintiff was hurt. There was evidence that the defendant knew that his pigs had got through the fences on previous occasions, and his negligence consisted in not preventing them from so doing. The verdict was for the plaintiff, but the Court granted a new trial. Pigott, B., clearly was of opinion that the true cause of the injury was the negligence of the railway company and not that of the defendant. The other members of the Court, Bramwell and Pollock, BB., concurred in this view, but went further and expressed their opinion that whether the doctrine laid down in *Thorogood* v. *Bryan* [2] was right or not, yet the plaintiff being a servant of the railway company, which had omitted to keep its fence in proper order, could not be in a better position than the company would have been in if its property had been

[1] E. B. & E. 719.
[2] 8 C. B. 115.
[3] L. R. 9 Ex. 176.
[4] L. R. 10 Ex. 47.

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injured by the defendant's pigs, and if the company had sued him for such injury. This view was again adopted in *Armstrong* v. *Lancashire and Yorkshire Railway Company*[1]. In that case the plaintiff was in the employment of the London and North-Western Railway Company, and was injured by a collision between a train belonging to that company and one belonging to the defendants. The collision was in the opinion of the jury caused by the negligence of the servants of both companies. The judge at the trial directed the verdict to be entered for the defendants, with leave for the plaintiff to move to enter the verdict for him. The Court held that the verdict had been rightly entered for the defendants. The Court seems to have thought that the negligence causing the collision was really that of the London and North-Western Railway Company, and not of the defendants, but it did not decide the case on this ground. The Court followed *Thorogood* v. *Bryan*[2]. Bramwell, B., thought that the plaintiff could not sue his own employers, and therefore could not sue the defendants who only contributed to the mischief, and were certainly not the proximate causes of it. If the learned baron meant that the negligence of the defendants was not part of the proximate cause of the injury to the plaintiff, it is obvious that they were not liable at all. But if the proximate cause was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company; or in other words, to be without a remedy. Wrongdoers are liable to be sued severally, some of them have a defence and others none. I cannot see why a servant should not sue a person who injures him, although his master or a fellow servant also injures him at the same time, and so that his injury is the result of the conduct of both of the others. Both these cases were, therefore, rightly decided on the ground that the negligence of the defendants was not the proximate cause of the injuries sustained by the plaintiff. But the reasons for which Bramwell, B., considered that the plaintiff must fail, even if *Thorogood* v. *Bryan*[2] was decided on wrong grounds, are really open to the same objections as the doctrine enunciated in that case. *Thorogood* v. *Bryan*[2] and *Armstrong* v. *Lancashire and Yorkshire Railway Company*[1] affirm that, although if *A.* is injured by the combined negligence of *B.* and *C.*, *A.* can sue *B.* and *C.* or either of them,

[1] L. R. 10 Ex. 47. [2] 8 C. B. 115.

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he cannot sue *C.* if he, *A.*, is under the care of *B.*, or in his employ. From this general doctrine I am compelled most respectfully to dissent, but if *B.* is *A.*'s agent or servant the doctrine is good. In Scotland the decision in *Thorogood* v. *Bryan* [1] was discussed and held to be unsatisfactory in the case of *Adams* v. *Glasgow and South-Western Railway Company* [2]. In America the subject was recently examined with great care by the Supreme Court of the United States in *Little* v. *Hackett* [3], in which the English and American cases were reviewed, and the doctrine laid down in *Thorogood* v. *Bryan* [1] was distinctly repudiated as contrary to sound principles. In this case the plaintiff was driving in a hackney carriage and was injured by a collision between it and a railway train on a level crossing. There was negligence on the part of the driver of the carriage and on the part of the railway company's servants, but it was held that the plaintiff was not precluded from maintaining an action against the railway company. In this country *Thorogood* v. *Bryan* [1] was distinctly disapproved by Dr. Lushington in *The Milan* [4], and even Lord Bramwell, who has gone further than any other judge in upholding the decision, has expressed disapproval of the grounds on which it was based. No text-writer has approved of it, and the comments in Smith's *Leading Cases* are adverse to it (vol. i. 266, sixth edition). For the reasons above stated, I am of opinion that the doctrines laid down in *Thorogood* v. *Bryan* [1] and *Armstrong* v. *Lancashire and Yorkshire Railway Company* [5] are contrary to sound legal principles, and ought not to be regarded as law. Consequently I am of opinion that the decision in Toeg's and Armstrong's case ought to be reversed.

LORD ESHER, M. R., and LOPES, L. J., delivered judgement to the same effect, and the judgement of BUTT, J., was reversed.

The decision of the Court of Appeal was affirmed in the House of Lords. L. R. 13 App. Cas. 1.

[1] 8 C. B. 115.
[2] 3 Court Sess. Cas. 215.
[3] 14 Am. Law Record, 577; 54 Am. Rep. 15.
[4] Lush. 388.
[5] L. R. 10 Ex. 47.

1896. HARDAKER *v.* THE IDLE DISTRICT COUNCIL, L. R. 1896. 1 Q. B. 335 (C. A.).

Where the performance of an act imposes upon a person a duty to exercise care with reference to another person or the public, he cannot escape liability by delegating the performance of the act to an independent contractor.

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Application by the plaintiffs, Tom Hardaker and his wife, that the judgement entered at the trial of the action for the defendant district council might be set aside, and that judgement might be entered for the plaintiffs against the district council, or in the alternative that a new trial might be ordered between the plaintiffs and the district council.

The action was brought against the Idle District Council and Abraham Thornton, who was a contractor, for having in the construction of a sewer been guilty of negligence by omitting to keep a gas-pipe properly supported, so that it became fractured, and the gas escaped out of it into the plaintiffs' house, and exploded, the result being that the furniture of the husband in the house was wrecked, and the wife, who was in the house at the time, was seriously injured.

On October 10, 1894, the Idle Local Board (the predecessors of the district council) gave notice, under the provisions of the Public Health Act, 1875, s. 150, to the husband to construct a sewer in Moorfield Place, he being the occupier of a house abutting thereon; and, the notice not being complied with, the board, as they were empowered to do by the section, proceeded themselves to execute the works mentioned in the notice.

In order to carry out these works the local board, by indenture under seal, contracted with the defendant Thornton that he should construct the sewer for them, in accordance with a specification, bill of quantities, and drawings thereto annexed, for the sum of £157 16*s.* 4*d.*

It was proved at the trial before Wright, J., with a jury that the defendant Thornton had been guilty of negligence by insecurely packing the soil around a gas-pipe in use after the excavation had been made for the sewer, whereby the gas-pipe was broken and the gas escaped and found its way into the plaintiffs' house, where it exploded.

The learned judge held that the district council were not liable

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for the negligence of their contractor. The jury found a verdict for the plaintiffs as against the defendant Thornton, and assessed the damages at £45. Judgement was accordingly entered for the district council, and judgement was entered for the plaintiffs as against Thornton for £45.

Kershaw, Q.C., and W. J. Waugh, for the plaintiffs.—The learned judge ought to have held that the district council, as well as the contractor, were liable to the plaintiffs.

1. Upon the true construction of the contract the relation between the council and the contractor was that of master and servant. Unless that relation existed the council would not be liable for the collateral negligence of the contractor: *Dalton* v. *Angus*[1]; *Gray* v. *Pullen*[2]; *Pickard* v. *Smith*[3].

2. Even if the relation of master and servant does not exist, an employer is liable for the negligence of the man whom he employs in the doing of an act which the employer has expressly ordered him to do: *Hole* v. *Sittingbourne and Sheerness Railway Company*[4]. This principle applies here.

3. Whenever a duty is cast upon a person who is doing an act he is liable for the proper performance of that duty, and he cannot escape from his responsibility by delegating the performance of the duty to a contractor. He remains liable to those who are injured by the non-performance of the duty, even though the contractor has agreed to indemnify him: *Bower* v. *Peate*[5]; *Gray* v. *Pullen*[2].

The district council stand in this position.

Tindal Atkinson, Q.C., and Longstaffe, for the district council.

1. The contract does not make the contractor the servant of the council. The true test whether the relation of master and servant is constituted is whether the person employed cannot act at all without the direction of the employer. That is not the effect of this contract. The power of dismissing incompetent workmen is not sufficient to render the council liable: *Reedie* v. *London and North-Western Railway Company*[6]. The council had no control over the contractor's servants.

2. There is nothing to show that the explosion was the direct

[1] L. R. 6 App. Cas. 740, 829.
[2] 5 B. & S. 970.
[3] 10 C. B. (N. S.) 470.
[4] 6 H. & N. 488.
[5] L. R. 1 Q. B. D. 321, 326.
[6] 4 Ex. 244.

result of any order given by the council or their inspector. The inspector was under no obligation to give any directions, and it is not proved that he gave any.

3. The council did not owe any special duty to the plaintiffs; their only duty to them was the duty which they owed to them in common with the public generally. That is not sufficient: *Hughes* v. *Percival*[1].

[RIGBY, L. J.—In *Tarry* v. *Ashton*[2] there was only a general duty to the public.]

At any rate, the damages are too remote: *Sharp* v. *Powell*[3]; *Burrows* v. *March Gas and Coke Company*[4].

Kershaw, Q.C., in reply.—As to remoteness of damage, it is the natural consequence of allowing gas to escape that it will explode, and he who allows it to escape must be liable for the consequences: *Hadley* v. *Baxendale*[5].

The council were executing the works under their statutory powers, and they owed a duty to all the world to see that the gas-pipe was properly protected. *Bower* v. *Peate*[6] was not impeached in *Hughes* v. *Percival*[1].

Cur. adv. vult.

LINDLEY, L. J., after stating the facts, read the following judgement:—The powers conferred by the Public Health Act, 1875, on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves—i. e. by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral

[1] L. R. 8 App. Cas. 443.
[2] L. R. 1 Q. B. D. 314.
[3] L. R. 7 C. P. 253.
[4] L. R. 5 Ex. 67; 7 Ex. 96.
[5] 9 Ex. 341.
[6] L. R. 1 Q. B. D. 321.

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negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes of cases is well illustrated by comparing *Reedie* v. *London and North-Western Railway Company* [1] with *Hole* v. *Sittingbourne and Sheerness Railway Company* [2]. In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defendants were held not liable. In the second case the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open. The plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustrated by *Pickard* v. *Smith* [3] (the coal-cellar case) and *Gray* v. *Pullen* [4], in which the Court of Exchequer Chamber, reversing the judgement of the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain. Blackburn, J., at the trial, and the Court of Queen's Bench, held the defendant not liable, on the ground that he was not responsible for the negligence of the contractor in doing the work. But on appeal it was held that it was the defendant's duty to fill up the drain, or to see that it was filled up, and that he was liable for the non-performance of this duty. Lord Chelmsford, in *Wilson* v. *Merry* [5], expressed some doubt as to the correctness of this decision; but I cannot find that it has ever been overruled or considered unsatisfactory by any other judge. The same principle was again applied in *Tarry* v. *Ashton* [6], in which a lamp on the defendant's property fell on the plaintiff whilst he was passing under it. So again, in *Bower* v. *Peate* [7], *Dalton* v. *Angus* [8], *Hughes* v. *Percival* [9]—in all of which cases the defendant's contractor had let down the plaintiff's wall. In each of them the defendant was held responsible, because it was his duty not to let the wall down, and to take whatever

[1] 4 Ex. 244.
[2] 6 H. & N. 488.
[3] 10 C. B. (N. S.) 470.
[4] 5 B. & S. 970.
[5] L. R. 1 H. L., Sc. 326, at p. 341.
[6] L. R. 1 Q. B. D. 314.
[7] L. R. 1 Q. B. D. 321.
[8] L. R. 6 App. Cas. 740, 829.
[9] L. R. 8 App. Cas. 443.

care was necessary to prevent injury to it from what he was doing. *Black* v. *Christchurch Finance Company*[1], in the Privy Council, is the last case on the subject, and there a landowner, who had employed a contractor to burn the bush on his land, was held liable for his negligence in burning it so as to be unable to stop the spread of the fire on to the land of the plaintiff.

It is not always easy to avoid mistakes in applying this, or indeed any other, principle to difficult cases, as is shown by *Gray* v. *Pullen*[2] and *Butler* v. *Hunter*[3]. The latter case is inconsistent with *Bower* v. *Peate*[4], but was distinctly disapproved by Lord Blackburn in *Hughes* v. *Percival*[5]. Neither is it easy to express the principle in terms which will apply to all cases, as is shown by Lord Blackburn's criticisms[5] when referring to *Bower* v. *Peate*[4] and *Quarman* v. *Burnett*[6], the well-known job-master's case. I will take the law, however, as it was laid down by Lord Blackburn in *Dalton* v. *Angus*[7]. Lord Blackburn there said: 'Ever since *Quarman* v. *Burnett*[6] it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne and Sheerness Railway Company*[8]; *Pickard* v. *Smith*[9]; *Tarry* v. *Ashton*[10].' Lord Blackburn in this passage contrasts a contractor's negligence, which he calls 'collateral,' with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negli-

[1] [1894] A. C. 48.
[2] 5 B. & S. 970.
[3] 7 H. & N. 826.
[4] L. R. 1 Q. B. D. 321.
[5] L. R. 8 App. Cas. 443, 446, 447.
[6] 6 M. & W. 499.
[7] L. R. 6 App. Cas. 740, 829.
[8] 6 H. & N. 488.
[9] 10 C. B. (N. S.) 470.
[10] L. R. 1 Q. B. D. 314.

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gence or not. Lord Blackburn's language in *Hughes* v. *Percival*[1] shows that this is really what he meant, for he points out that the employer's duty was to see that his contractor did his work properly. Lord Watson[2] said the same thing.

I pass now to consider the duty of the district council in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under: this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all. The case falls within the second of Lord Blackburn's propositions, and not within the first. It was contended for the district council that, although they might be liable to the owner of the gas-pipes, they were not liable to the plaintiff, as they were under no duty to him. But this is not consistent with *Gray* v. *Pullen*[3], nor with *Tarry* v. *Ashton*[4], in neither of which was the defendant under any duty to the plaintiff, except as one of the public. On these grounds I am of opinion that the district council are liable to the plaintiffs.

Mr. Kershaw contended that the relation between the district council and Thornton was that of master and servant. Of course, if this were so, the liability of the district council would be clear enough. But I am not prepared to decide the case on this ground. It is not proved that the inspector gave orders which led to the mischief; and, large as the inspector's powers were, Thornton was not, in my opinion, the servant of the defendants. *Reedie* v. *London and North-Western Railway Company*[5] and *Steel* v. *South-Eastern Railway Company*[6] support this conclusion.

With respect to the remoteness of damage, little need be said. The nature of gas, its certainty to escape, and to find its way wherever it can get, and to explode, if it escapes in large quantities

[1] L. R. 8 App. Cas. at p. 446.
[2] L. R. 8 App. Cas. at p. 449.
[3] 5 B. & S. 970.
[4] L. R. 1 Q. B. D. 314.
[5] 4 Ex. 244.
[6] 16 C. B. 550.

and comes into contact with fire, all render the breaking of a gas-main very dangerous if houses are near. The fact, moreover, that free escape upwards through the surface of the road was greatly hindered by the hardness of the surface after it was left by the contractor would tend to force the gas laterally to some considerable distance, and very probably into some passage or place near a fire. Such an accident as that which actually happened is only what might have been reasonably expected. *Sharp* v. *Powell*[1] does not, therefore, apply to the present case. The appeal must be allowed, and judgement must be entered for the plaintiffs against the district council for £45 and the costs of the action; and the district council must pay the costs of the appeal.

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A. L. SMITH and RIGBY, L. JJ., delivered judgement to the same effect, and the judgement of WRIGHT, J., was reversed.

1866. THE MERSEY DOCKS AND HARBOUR BOARD TRUSTEES *v.* GIBBS; SAME *v.* PENHALLOW, L. R. 1 H. L. 93.

Corporations entrusted by statute with the execution or maintenance of works for the benefit of the public are (in the absence of express statutory exemption) equally liable with a private person or company for the negligence of their servants, although neither the corporation nor the individual corporators have any beneficial interest in the profits of the undertaking.

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These were proceedings in Error on two decisions of the Court of Exchequer Chamber[2], in two cases, both of which arose out of the same circumstances.

The declaration in the action, at the suit of Gibbs, contained two counts. The first count alleged that the plaintiffs were the owners of the cargo of the *Sierra Nevada*; that the said ship had arrived in the port of Liverpool; that the defendants were the proprietors of a certain dock in the said port, called the Wellington Dock, made and constructed by them under the powers of certain Acts of Parliament; and by virtue of the said Acts they were entitled to receive port dues, &c., in respect of vessels navigating the said port; and the said dues, &c., it was their duty, under the said Acts of Parliament, to apply and dispose in and about, amongst other things, the maintaining, cleansing, supporting, and

[1] L. R. 7 C. P. 253.

[2] 3 H. & N. 164; 7 Id. 329.

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preserving the said dock, so as to be in a fit state for vessels entering into and navigating the same. Nevertheless, &c., the defendants neglected their duty, and did not take due and reasonable, or any care, in or about the maintaining, cleansing, supporting or preserving the said dock, insomuch that the said vessel, in duly endeavouring to enter into and navigate the said dock, struck against, and became embedded in, a large bank or mass of mud remaining, by and through the negligence of the defendants, in and about the entrance to the said dock, and in consequence thereof was damaged, and water and mud entered the same, and damaged the said guano; and the defendants also neglected their duty in this, that well *knowing* that the said Wellington Dock and the entrance thereto was, by reason of certain great accumulations of mud therein, in an unfit state to be used and navigated by vessels, they did not take due and reasonable care to put the same into a fit state for that purpose; but, on the contrary thereof, neglected, &c., and suffered, and permitted the said dock, and the entrance thereof, to be and continue, while the same was, as they well knew, and by their permission, navigated and used by such vessels, in an unfit state to be so navigated and used, for want of necessary and reasonable cleansing, insomuch, &c., that the said vessel, in endeavouring to enter the dock, became embedded in the mud, &c., and mud and water entered the vessel, and damaged the guano. The trustees pleaded—first, not guilty; secondly, that they were not the owners and proprietors of the said dock, as alleged; thirdly, that they were not entitled to receive the dues, &c., and to dispose of them, as alleged; and they also demurred to the declaration. The plaintiffs took issue on the pleas and joined in demurrer.

The Court of Exchequer, on the authority of *Metcalfe* v. *Hetherington* [1], held the demurrer to be good and gave judgement accordingly [2], which judgement was reversed in the Exchequer Chamber [3]. On the trial of the issues in fact, before Mr. Baron Martin, at the Liverpool Summer Assizes, in 1858, a verdict was found for the plaintiffs.

The declaration in the action of *Penhallow* was in substance the same, and in that action the defendants pleaded not guilty, and also

[1] 11 Ex. 257; 5 H. & N. 719. [2] 1 H. & N. 439.
[3] 3 H. & N. 164.

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that the plaintiffs were not the owners of the ship as alleged. The cause was tried in Middlesex, before Lord Chief Baron Pollock, at the Michaelmas Sittings, 1859. The learned judge's direction was, that if the cause of the injury was a bank of mud in the dock, and if the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable, and the verdicts must be for the plaintiffs. A bill of exceptions was tendered to this direction, on the ground that the jurors ought to have been told that the defendants were not liable unless they or their servants knew that the entrance was, by reason of the said mud bank, in an unfit state to be navigated, or knew that it was in a dangerous condition for ships navigating the same. The verdict having been given for the plaintiffs, the case was argued on this bill of exceptions, and the Court of Exchequer Chamber gave judgement for the plaintiffs [1].

Error was alleged against both these judgements. The judges were summoned, and Mr. Baron Channell, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee attended.

THE LORD CHANCELLOR (Lord Westbury) moved that the following questions be put to the judges:—

In the case of the *Mersey Docks Trustees* v. *Gibbs*: 'Does the declaration in this case state a good cause of action?'

In the case of the *Mersey Docks Trustees* v. *Penhallow*: 'Is the judgement of the Court of Exchequer Chamber right?'

The judges were unanimously of opinion that both questions should be answered in the affirmative.

THE LORD CHANCELLOR (Lord Cranworth).—My lords, these are two appeals depending very much on the same principles as those which led to the decision of your lordships' House last year, in the case of *The Mersey Docks and Harbour Board* v. *Cameron* [2]. The question there was, whether the trustees of the docks and harbour, who are a body having no beneficial interest in the tolls and other produce of the docks, were rateable to the relief of the poor. The argument was, that merely constituting a public body, not receiving

[1] 7 H. & N. 329. [2] 11 H. L. C. 443.

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tolls for their own benefit, they were not liable; but your lordships, after a long argument, decided that they were.

The question in the present two cases is different. Both cases arise out of one transaction. A ship called the *Sierra Nevada*, in entering, or endeavouring to enter, one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the appellants, one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the appellants were liable. In both cases they have appealed, and the ground of appeal is, that they are not a company deriving benefit, like a railway company, from the traffic, but a public body of trustees constituted by the legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls, to be applied to the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public.

In the case of Gibbs, it must be taken as admitted by the appellants, that knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same 'into a fit state for that purpose'; whereupon the *Sierra Nevada*, in endeavouring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case (which did not arise upon a demurrer), it must be taken as an established fact, that the appellants had, by their servants, the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgement of the House in the one case, must also decide it in the other. And the question therefore is, What are the principles which regulate the liabilities of such a body as that of the Mersey Docks and Harbour Board?

Where such a body is constituted by statute, having the right to

levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Error in the case of *Parnaby* v. *The Lancaster Canal Company*[1]. The ground on which the Court of Error rested the decision in that case, is stated by Tindal, C.J., to have been that defendants there, who constituted the company, made the canal for their profit, and opened it to the public upon the payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.

The only difference between that case and those now standing for decision by your lordships is, that here the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.

It is impossible to argue, after the decision of this House in the case of the *Mersey Docks and Harbour Board* v. *Cameron*[2], that the appellants are not in the occupation of the docks. They are as much the occupiers of them as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby* v. *The Lancaster Canal Company*[1], must govern this case. The appellants are the occupiers of the docks, entitled to levy tolls from those who use the docks, and so are liable to the same responsibilities as would attach on them if they were the absolute owners occupying and using them for their own profit.

LORDS WENSLEYDALE and WESTBURY concurred, and judgement was given for the respondents.

[1] 11 A. & E. 223.

[2] 11 H. L. C. 443.

1876. NUGENT *v.* SMITH, L. R. 1 C. P. D. 423 (C. A.).

A common carrier at the common law is an insurer of goods committed to his charge and is responsible for their safe transport and delivery. In case of loss or injury thereto he is, therefore, as a rule liable though there may have been no negligence on his part. To this rule there is an exception when the loss or injury has been caused by what is called 'the act of God' [the king's enemies] or an inherent vice or defect in the goods carried and without negligence on the part of the carrier.

The 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him [per James, L. J.].

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COCKBURN, C. J.—This case involves a question of considerable importance as regards the law relating to carriers by sea, but the facts are few and simple. The plaintiff, being the owner of two horses, and having occasion to send them from London to Aberdeen, shipped them on board a steamship belonging to the company of which the defendant is the representative, plying regularly as a general ship between the two ports. The horses were shipped without any bill of lading. In the course of the voyage a storm of more than ordinary violence arose; and partly from the rolling of the vessel in the heavy sea, partly from struggling caused by excessive fright, one of the animals, a mare, received injuries from which she died. It is to recover damages in respect of her loss that this action is brought.

The jury, in answer to a question specifically put to them, have expressly negatived any want of due care on the part of the defendant, either in taking proper measures beforehand to protect the horses from the effects of tempestuous weather, or in doing all that could be done to save them from the consequences of it after it had come on. A further question (5) put to the jury was, whether there were any known means, though not ordinarily used in the conveyance of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare, but to this question the jury returned no answer. The question is, whether, on this state of facts, the shipowners are liable.

For the defendant, it was insisted that the storm, which was the

primary, and in a partial degree the proximate, cause of the loss, must be taken to have been an 'act of God' within the legal meaning of that term, so as, all due care having been taken to convey the mare safely, to afford immunity to the defendant's company as carriers from liability in respect of the loss complained of; and the question to be determined is, whether this contention is well founded.

The judgement of the Common Pleas Division in favour of the plaintiff, as delivered by Mr. Justice Brett, involves, if I rightly understand it, the following propositions: (1) That the Roman law relating to bailments has been adopted by our courts as part of the common law of England; (2) That, by the Roman law, the owners of all ships, whether common carriers or not, are equally liable for loss by inevitable accident; (3) That such is the rule of English law as derived from the Roman law, and as evidenced by English authorities; (4) That, to bring the cause of damage or loss within the meaning of the term 'act of God,' so as to give immunity to the carrier, the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect; (5) That, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, the defendant has in this case failed to satisfy the burden of proof cast upon him, so as to bring himself clearly within the definition, as it is impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred.

In no part of this reasoning am I able to concur. But before I proceed to deal with it, I must observe that, as the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports and carrying the goods of all comers as a general ship, and as from this it necessarily follows that the owners were common carriers, it was altogether unnecessary to the decision of the present case to determine the question so elaborately discussed in the judgement of Mr. Justice Brett as to the liability

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of the owner of a ship, not being a general ship, but one hired to carry a specific cargo on a particular voyage, to make good loss or damage arising from inevitable accident. The question being, however, one of considerable importance—though its importance is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charterparty or bill of lading—and the question not having before presented itself for judicial decision, I think it right to express my dissent from the reasoning of the Court below, the more so as, for the opinion thus expressed, I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship. Parsons, a writer of considerable authority on this subject, defines a common carrier to be 'one who offers to carry goods for any person between certain termini and on a certain route.' 'He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage.' 'If either of these elements is wanting, we say the carrier is not a common carrier, either by land or by water.' 'If we are right in this,' he adds, 'no vessel will be a common carrier that does not ply regularly, alone or in connexion with others, on some definite route, or between two certain termini [1].' Story seems to be of a like opinion. 'When it is said,' he observes, 'that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or foreign trade, or on general freighting business, for all persons offering goods on freight for the port of destination.' 'But if the owner of a ship employs it on his account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight, not receiving them for persons in general, he will not be deemed a common carrier, but a mere private carrier [2].' So Angell, speaking of shipowners as common carriers, says: 'When it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all persons

[1] Parsons, *Shipping*, p. 245. [2] Story on *Bailments*, s. 501.

indifferently. Should the owner of a ship employ it on his own account, and for the special accommodation of a particular individual, take goods on board for freight, not receiving them from all persons indifferently, he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment[1].' But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship.

In the absence of all common-law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier, as asserted in the judgement below, the authority of the Roman law is invoked; but this law, on which so much stress is laid in the judgement of the Court of Common Pleas, affords no support to this doctrine. In the first place, it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability in respect of loss beyond that of other bailees for reward. In the second place, the Roman law made no distinction between inevitable accident arising from what in our law is termed the 'act of God' and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from *casus fortuitus*, or, as it is also called, *damnum fatale*, or *vis maior*—unforeseen and unavoidable accident. The language of the Praetorian Edict, as given in the Digest, might indeed, if it stood alone, lead to the supposition that the liability of the carrier by sea was unlimited: 'Ait praetor: nautae, caupones, stabularii quod cuiusque salvum fore receperint, nisi restituant, in eos iudicium dabo' (Dig. iv. tit. 9). But Ulpian, who gives the words quoted in his treatise on the Edict, explains their meaning: 'Hoc edicto omni modo qui recepit tenetur, etiam si sine culpa eius res periit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. Idem erit dicendum si in stabulo aut in cauponâ vis maior contigerit.'

[1] Angell on *Carriers*, s. 89.

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In the one case the absence of *culpa* makes no difference. In the other it does. No difference of opinion exists among civilians as to the law on this subject. There is no doubt that inevitable accident —*damnum fatale*, *casus fortuitus*, *vis maior*—for these are synonymous terms—exempt the carrier from liability. 'Casus fortuitus,' says Averani, 'appellatur vis maior, vis divina, fatum, damnum fatale, fatalitas.'

Such is the Roman law, and such is the existing law of all the nations which have adopted the Roman law—France, Spain, Italy, Germany, Holland, and, to come nearer home, Scotland. It is embodied in the Code Civil of France. Treating of carriers by land and by water the Code says (Art. 1754): 'Ils sont responsables de le perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues et avariées par cas fortuit ou force majeure.'

That such is the law of Scotland we learn from what is said in Erskine's *Institutes*, pp. 591, 592, n., from which it appears that by that law, not only storm and pirates, but also housebreaking and fire, constitute *damnum fatale*, which will exonerate the innkeeper or carrier: see also the Appendix to Stair's *Institutes*, by More, p. 57. But not only does this essential difference between the Roman law and our own suffice to show that, so far as the liability of carriers is concerned, our law has not been derived from the Roman: as matter of legal history we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was, in the first instance, established with reference to carriers by land to whom by the Roman law no such liability attached. It was not till the ensuing reign, in the eleventh of James I, that it was decided, in *Rich* v. *Kneeland*[1], that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no difference between them. The next case in point of date, and it is the first case in the books in which the liability of the owner of a sea-going ship comes in question, is the well-known case of *Morse* v. *Slue*[2], in which it was held, after a trial at bar, that where a ship lying in the Thames was boarded by robbers, who took the plaintiff's goods which had been loaded on board, in an action brought against the master, the plaintiff was entitled to recover. And it certainly surprises me that this

[1] Cro. Jac. 330; Hob. 17.

[2] 1 Vent. 190, 238.

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case should be relied on as an authority for the position that the liability of a common carrier attaches to the shipowner or master where the ship is not a general ship; for though it is not expressly said that the ship in question was a general ship, which has led to the somewhat hasty assumption that she was not, the internal evidence shows conclusively that she was so. In the first place, the declaration is laid on the custom of the realm, and we know that the only custom to which effect had up to that time been given—and that quite in recent times—was in respect of common carriers by land, and still more recently in respect of common carriers by water. Secondly, Hale, C. J., in giving judgement, puts the case as on all fours with that of a common carrier or hoyman, and nowhere says that it is to be treated as that of a private ship. 'He who would take off the master from this action,' says the chief justice, 'must assign a difference between it and the case of a hoyman, common carrier, or innholder.' Doubtless the counsel for the defendant, if the case had been distinguishable on the ground that the vessel was not a common ship, would have pointed out the difference, and at all events have taken the point; and in the corresponding report of the same case in Levinz [1], the case of *Rich* v. *Kneeland* [2] having been referred to, the chief justice is reported to have said that the case 'differed not from that of the hoyman.' But in the case of *Rich* v. *Kneeland* [2] we know that the barge or hoy was a common carrier; and it is obvious that if in *Morse* v. *Slue* [3] the vessel had been a private one, instead of treating the case as identical with that of the common hoyman, the chief justice would have put it on the ground that all sea-going vessels were subject to the larger liability. But besides this, there is a circumstance which appears to have been overlooked, which seems decisive to show that the ship must have been a general ship. It is mentioned in the report in Ventris, that the ship was a vessel of 150 tons burden, bound for Cadiz, and that the goods shipped by the plaintiff consisted of three trunks, containing 400 pairs of silk stockings and 174 lbs. of silk. It seems idle to suppose that a ship of that size would have been hired on such a voyage for the purpose of carrying the plaintiff's three trunks as her entire cargo. There seems, therefore, no reasonable doubt that the ship was a general

[1] 2 Lev. 69. [2] Cro. Jac. 330; Hob. 17.
[3] 1 Vent. 190, 238.

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ship. In like manner, in the case of *Dale* v. *Hall*[1], although the declaration was not upon the custom of the realm, but upon the implied obligation to carry safely, it appearing that the defendant was a shipmaster or keelman who carried goods from port to port, the Court decided in favour of the plaintiff, expressly on the liability of the defendant as a common carrier (though the latter was prepared to show an absence of negligence on his part), on the ground that the allegation of the duty of a common carrier 'to carry safely' was equivalent to a declaration on the custom of the realm. In the subsequent case of *Barclay* v. *Cuculla y Gana*[2], which was a case where, as in *Morse* v. *Slue*[3], goods had been forcibly taken by thieves from a ship lying in the Thames, on the objection being taken on behalf of the defendant that he was not charged in the declaration on the custom of the realm, while there was neither express undertaking nor negligence to make him liable otherwise, the answer of the Court was 'that there was no question at the trial as to the ship being a general ship'; and Lord Mansfield adds that it was impossible to distinguish the case from that of a common carrier.

Thus far the reported cases as to carriers by sea have been cases of general vessels. The next in point of time, that of *Lyon* v. *Mells*[4], was one in which the defendant kept sloops for carrying other persons' goods for hire, and also lighters for carrying such goods to and from his sloops as well as to and from the sloops of other owners. One of these lighters, in which goods of the plaintiff were being conveyed on board a sloop, proved leaky and took in a quantity of water, and the goods became seriously damaged, and it was also found as a fact that the goods had been negligently stowed. The defendant relied on a notice that he would not be answerable for any loss or damage unless occasioned by want of ordinary care of the master and crew, in which case he would pay 10 per cent. on the loss or damage; but that persons desirous of having their goods carried free from any risk in respect of loss or damage, whether arising from the act of God or otherwise, might have them so carried on entering into an agreement to pay extra freight in proportion to the risk. No extra freight having been paid, the question was whether the defendant was protected by this

[1] 1 Wils. 281.
[2] 3 Doug. 389.
[3] 1 Vent. 190, 238.
[4] 5 East. 428.

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notice from liability for more than 10 per cent. of the damage. Nothing in reality turned upon his being a common carrier or subject to the liabilities of a common carrier. Some discussion, it is true, took place on the argument as to whether the defendant was a common carrier or not; but Lord Ellenborough, in giving judgement, put the matter on the right footing, namely, that a carrier by water impliedly engages that his vessel shall be watertight, an obligation obviously applicable to all carriers, whether common carriers or otherwise, and that the defendant could not be taken to have intended by such a notice to claim immunity in respect of his own breach of contract, but only immunity above 10 per cent. for loss or damage arising from the negligence of the master and crew, and total immunity in respect of loss or damage from the act of God or other cause, unless extra freight was paid. The owner no doubt thought his liability that of a common carrier, and, as Lord Ellenborough points out, sought to protect himself accordingly; but Lord Ellenborough nowhere treats him as such, but decides the case on a general ground applicable to all carriers, whether common or private. Yet this case is relied on, erroneously as it appears to me, as showing that a man who lets out a lighter or ship, not to carry the goods of general comers, but to a particular individual on a specific job or contract, if his business be to let out lighters or ships, is a common carrier, or is at all events subject to an equal degree of liability. The last case is that of the *Liver Alkali Co.* v. *Johnson* [1], in which the defendant was a barge owner and let out his vessels for conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods, the Court of Exchequer Chamber held, affirming the judgement of the Court of Exchequer, that the defendant was a common carrier and liable as such. Brett, J., differing from the majority, held that the defendant was not a common carrier, but, asserting the same doctrine as in the judgement now appealed from, held him liable upon a special custom of the realm attaching to all carriers by sea, of which custom, however, as

[1] L. R. 9 Ex. 338.

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I have already intimated, I can find no trace whatever. We are, of course, bound by the decision of the Court of Exchequer Chamber in the case referred to as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal; but I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it. At all events, it is obvious that as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the Court below, that all shipowners are equally liable for loss by inevitable accident. It is plain that the majority of the Court did not adopt the view of Brett, J. Lastly, while it does not lie within our province to criticize the law we have to administer or to question its policy, I cannot but think that we are not called upon to extend a principle of extreme rigour, peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which the rule of our law was supposed to be necessary, further than it has hitherto been applied. I cannot, therefore, concur in the opinion expressed in the judgement delivered by Brett, J., that by the law of England all carriers by sea are subject to the liability which by that law undoubtedly attaches to the common carrier whether by sea or by land.

But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision really turns, namely, whether the loss was occasioned by what can properly be called the 'act of God.'

The definition which is given by Brett, J., of what is termed in our law the 'act of God' is, that it must be such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. The judgement then proceeds: 'We cannot say, notwithstanding the

inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred.'

The exposition here given appears to me too wide as regards the degree of care required of the shipowner, and as exacting more than can properly be expected of him. It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term 'act of God,' as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavour to lay down an intelligible rule.

That a storm at sea is included in the term 'act of God' can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis maior* coming under the denomination of 'act of God.' But it is equally true, as has already been pointed out, that it is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis maior*, and the degree of diligence which he is bound to apply to that end.

It is at once obvious, as was pointed out by Lord Mansfield in *Forward* v. *Pittard*[1], that all causes of inevitable accident—*casus fortuitus*—may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable.

[1] 1 T. R. 27.

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On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the 'act of God,' that it necessarily follows that the carrier is entitled to immunity. The rain which fertilizes the earth and the wind which enables the ship to navigate the ocean are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care loss of damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided; or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only, as has been observed, has there been no judicial exposition of the meaning of the term 'act of God' as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, but the text-writers, both English and American, are, for the most part, silent on the subject and afford little or no assistance. Being here, however, on common ground with the civilians, so far as one head of inevitable accident is concerned, it may be of use, while endeavouring more clearly to fix the limits of that class of inevitable accidents which comes under the head of 'act of God,' to turn to their views on the subject with reference to inevitable accidents in general. As the result of the different instances of *casus fortuitus* which occur in the Digest,

Vinnius gives the following definition: 'Casum fortuitum definimus omne quod humano coeptu praevideri non potest, nec cui proviso potest resisti' (*Partit. Iuris* lib. ii. c. 66). He enumerates various instances: 'Casus fortuiti varii sunt: veluti a vi ventorum, turbinum, pluviarum, grandinum, fulminum, aestus, frigoris, et similium calamitatum quae coelitus immittuntur. Nostri vim divinam dixerunt. Graeci, *θεοῦ βίαν*. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinae aedium, fundorum chasmata, incursus hostium, praedonum impetus. His adde damna omnia a privatis illata, quae quominus inferrentur nullâ curâ caveri potest.' Baldus (*Quaest.* 12, no. 4), gives the following definition: 'Casus fortuitus est accidens, quod per custodiam, curam, vel diligentiam mentis humanae non potest evitari ab eo qui patitur.'

In our own law on this subject judicial authority, as has been stated, is wanting, and the text-writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are of course included, and consequently to a great extent the instances of inevitable accident at sea which come under the term 'act of God,' uses the following language: 'The phrase "perils of the sea," whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party[1].' Story, it will be observed, here speaks only of 'ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence.' In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of

[1] Story on *Bailments*, 512 (a).

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'acts of God.' In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to ensure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis maior* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the *vis maior* must be such as 'no amount of human care or skill could have resisted,' or the injury such as 'no human ability could have prevented,' and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to ensure the safety of the mare is, I think, involved in the finding of the jury, directly negativing negligence, and I think that it was not incumbent on the defendants to establish more than is implied by that finding.

The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright, leaving it doubtful whether the fright was the natural effect of the storm or whether it arose from an unusual degree of timidity peculiar to the animal and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma: if the fright which led to the struggling of the mare was in excess of what is usual in horses on shipboard in a storm, then the rule applies that the carrier is not liable where the thing carried perishes or sustains damage, without any fault of his, by reason of some quality inherent in its nature, and which it was not possible for him to guard against. If, on the other hand, the fright was the natural effect of the storm and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm, in other words with the act of

God, to afford protection to the carrier. If the disaster is the result of a combination of causes for neither of which the carrier was responsible, he cannot be made liable any more than if it had resulted from either of them alone.

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For these reasons I am of opinion that the judgement of the Court below must be reversed, and judgement entered for the defendant.

MELLISH, L. J., and CLEASBY, B., delivered judgement to the same effect, and JAMES, L. J., and MELLOR, J., concurred—and the judgement of the Court below was reversed.

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In an action for negligence it is for the judge to determine whether any facts have been given in evidence from which negligence *may be* reasonably inferred. It is for the jury to say whether that inference is to be drawn or not.

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This was an appeal against a decision of the Court of Appeal, affirming a decision of the Court of Common Pleas.

The facts and arguments sufficiently appear from the judgements.

THE LORD CHANCELLOR (Lord Cairns).—My Lords, in this case an action was brought by the respondent against the *Metropolitan Railway Company* for negligence in not carrying the respondent safely as a passenger on the railway, and for injuring his thumb by the act of one of the appellants' servants in suddenly and violently closing the door of the railway-carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord Coleridge, Mr. Justice Brett, and Mr. Justice Grove, was of opinion that there was such evidence. The Court of Appeal was equally divided; the Lord Chief Justice and Lord Justice of Appeal Amphlett holding that there was evidence, the Lord Chief Baron and Lord Justice of Appeal Bramwell holding that there was not.

The facts of the case are very short. The respondent in the evening of July 18, 1872, took a third-class ticket from Moorgate

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Street to Westbourne Park, and got into a third-class compartment; the compartment was gradually filled up, and when it left King's Cross all the seats were occupied. At Gower Street Station three persons got in and were obliged to stand up. There was no evidence to show that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at Gower Street.

At Portland Road, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was no evidence to show by whom either act was done. Just as the train was starting from Portland Road there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage-door to save himself, and at that moment, by the door being slammed to, the respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury found a verdict for the respondent with £50 damages. There was not, at your lordships' bar, any serious controversy as to the principles applicable to a case of this description. The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance to the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw

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the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the Court *in banc*, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial; and on a second trial, and even on subsequent trials, the same thing might happen again.

In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum iniuriae*. In the present case there was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the Gower Street Station; and it may also have been negligence if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have then removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place. If, when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent; if it had any effect on the particular portion of the carriage where he was sitting, if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence; but no evidence of the kind was given.

As regards what took place at Portland Road, I am equally unable to see any evidence of negligence connected with the

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accident, or indeed of any negligence whatever. The officials cannot, in my opinion, be held bound to prevent intending passengers on the platform opening a carriage-door with a view of looking or getting into the carriage. They are bound to have a staff which would be able to prevent such persons getting in where the carriage was already full, and this staff they had, for the case finds that the porter pushed away the persons who were attempting to get in. So also with regard to shutting the door: these persons had opened the door, and thereupon it was not only proper but necessary that the door should be shut by the porter; and, as the train was on the point of passing into a tunnel, he could not shut it otherwise than quickly or in this sense violently.

I have looked with some anxiety in order to discover what was considered by the learned judges in the Courts below to be the evidence from which negligence might be inferred in this case. Lord Coleridge mentions two points of negligence: first that there was no attempt made to remove the extra and inconvenient number of passengers from the carriage in which the respondent was seated when the company had an opportunity of doing so at the station; and secondly, that there was an uncontrolled action on the part of a number of persons on the platform, which action was not controlled and could not be controlled by reason of the want of sufficient servants of the company, who were to a reasonable extent bound to control it.

As to the first of these grounds, I have already said that admitting the negligence it appears to me to be in no way connected with the accident. As to the second, I do not think that there was an uncontrolled action on the part of the persons on the platform, for the case finds that the porter of the company did, in a way which seems to be both natural and proper, control the action of those who wished to get into the carriage.

Mr. Justice Brett in substance concurs with Lord Coleridge, and I do not know that there is any substantial difference in the view taken by Mr. Justice Grove.

In the Court of Appeal, however, Lord Justice Amphlett founded himself at the outset on the case of *Bridges* v. *The North London Railway Company*[1] in this House. He states[2], 'It is now settled

[1] L. R. 7 H. L. 213.

[2] L. R. 2 C. P. D. at p. 127.

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by that case (though previously doubted by many eminent judges), that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding judge.' And in like manner the Lord Chief Justice states at the conclusion of his judgement[1]: 'All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with that negligence as its cause, or as materially contributing thereto. I cannot doubt, especially after the decision of the House of Lords in *Bridges* v. *The North London Railway Company*[2], that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding judge to leave to their decision.'

These expressions of the learned judges appear to me to be of great importance, for I infer from them that if they had not considered the case of *Bridges* v. *The North London Railway Company*[2] to have the effect which they attribute to it, their decision in the present case might have been different. Now, my lords, I am bound to say that I cannot look at the case of *Bridges* as in any degree establishing the proposition which it appeared to Lord Justice Amphlett to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts is itself a question of fact for the jury, or as establishing the proposition which it appeared to the Lord Chief Justice to establish, namely, that the jurors are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause, or as materially contributing thereto. Your lordships, in the case of *Bridges*, did not lay down, and I am satisfied your lordships did not mean to lay down, any new rule upon this subject. It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred. In the case of *Bridges* there was a series of facts from which your lordships, advised as you were by several of the learned judges, thought that negligence might very reasonably have been inferred. There was the stop-

[1] L. R. 2 C. P. D. at p. 145. [2] L. R. 7 H. L. 213.

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ing of the train on a dark night in a tunnel badly lighted, and filled with steam; a heap of hard rubbish and no platform opposite to the carriage; the name of the station called out from the platform, and, after a short interval, when the train moved on, but not before some passengers had got out, a second cry, 'Keep your seats!' One of those passengers was heard to groan, and was found lying with his legs across the rails. In addressing your lordships, I myself stated [1] that 'if it had fallen to me to review a verdict of a jury given against a company under these circumstances, without any evidence to explain the facts, I should have been of opinion that the jury had come to a natural and proper conclusion, but that the only question which your lordships had to deal with was, Was there evidence of negligence to go to a jury? And that in my opinion there clearly was.' And I further stated [2] that I trusted the case might be found useful in future as negativing the idea that, under circumstances such as described, the case was to be withdrawn from the jury.

In the present case, on the other hand, I can find no such evidence, and therefore I feel obliged to move your lordships that the judgement given for the plaintiff in the Court below should be reversed, and a nonsuit entered, the respondent, according to what is usual in such cases, paying the costs of the appeal along with the costs below.

Lords O'HAGAN, BLACKBURN, and GORDON delivered judgement to the same effect, and the judgement given for the plaintiff in the Court below was set aside and a nonsuit entered.

NOTE.—The following American case deals with a point in the law of negligence as to which there is no direct English authority, and is inserted here accordingly.—[ED.]

1852. THOMAS & WIFE *v.* WINCHESTER, 6 N. Y. (2 Selden), 397.

RUGGLES, C. J., delivered the opinion of the Court.—This is an action brought to recover damages from the defendant for negligently putting up, labelling, and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison, by means of which the plaintiff Mary Anne Thomas, to whom being sick a dose of dandelion was prescribed by the physician, and a portion

[1] L. R. 7 H. L. at p. 239. [2] Ibid. at p. 240.

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of the contents of the jar was administered as and for the extract of dandelion and was greatly injured, &c. The facts proved were briefly these: Mrs. Thomas, being in ill-health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed at the store of Dr. Foord. A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects. . . . She recovered, however, after some time from its effects, although for a short time her life was thought to be in great danger. The medicine administered was *belladonna and not dandelion*. The jar from which it was taken was labelled '½ lb. Dandelion prepared by A. Gilbert, No. 108, John Street, N. Y. Jar 8 oz.' It was sold for, and believed by Dr. Foord to be, the extract of dandelion as labelled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108, John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labelled alike. Both were labelled like the jar in question as 'prepared by A. Gilbert.' Gilbert was a person employed by the defendant at a salary as an assistant in his business. The jars were labelled in Gilbert's name because he had previously been engaged in the same business on his own account at 108, John Street, and probably because Gilbert's label rendered the articles more saleable. The extract contained in the jar sold to Aspinwall and by him to Foord was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resembled each other in colour, consistence, smell and taste, but may on careful examination be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds: (1) That the action could not be sustained as the defendant was the remote vendor of the article in question; and there was no connexion, transaction or privity between him and the plaintiffs or either of them. (2) That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord. (3) That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action. (4) That according to the testimony Foord was chargeable with negligence, and that the plaintiffs, therefore, could not sustain this suit against the defendant; if they could sustain a suit at all it would be against Foord only. (5) That this suit, being brought for the benefit of the wife, and alleging her as the meritorious cause of action,

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cannot be sustained. (6) That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted. The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion the extract taken by Mrs. Thomas; or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover. But if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover—provided the extract administered to Mrs. Thomas was the same as was put up by the defendant, and sold by him to Aspinwall and by Aspinwall to Foord. That, if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment or expense to the husband; and that the recovery should be confined to the actual damages suffered by the wife. The action was properly brought in the name of the husband and wife, for the personal injury and suffering of the wife, and the case was left to the jury with a proper direction on that point[1].

The case depends on the first point taken by the defendant—on his motion for a nonsuit; and the question is whether the defendant, being a remote vendor of the medicine, and there being no privity or connexion between him and the plaintiffs, the action can be maintained. If in labelling a poisonous drug with the name of a harmless medicine for public market no duty was violated by the defendant, except that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If *A.* build a wagon and sell it to *B.*, who sells it to *C.*, and *C.* hires it to *D.*, who in consequence of the gross negligence of *A.* in building the wagon, is overturned and injured, *D.* cannot recover damages against *A.* the builder. *A.*'s obligation to build the wagon faithfully arises solely out of his contract with *B.* The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act immanently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown, and injured, in consequence of the smith's negligence in scoring, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse. It was a duty which the smith owed to him alone and to no one else; and although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound by his contract, or by any consideration of public policy or safety, to

[1] 1 Chitty on *Pleadings*, p. 62, edition 1828.

respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of *Winterbottom* v. *Wright*, 10 M. & W. 109, was decided. *A.* contracted with the Postmaster-General to provide a coach to convey the mail-bags along a certain line of road, and *B.* and others also contracted to horse the coach along the same line. *B.* and his co-contractors hired *C.*, who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down. The plaintiff was thrown from his seat and lamed. It was held that *C.* could not maintain an action against *A.* for the injury thus sustained. The reason of the decision was best stated by Rolfe, B. *A.*'s duty to keep the coach in good condition was a duty to the Postmaster-General with whom he made his contract, and not a duty to the driver employed by the owners of the horses. But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death, or great bodily harm, of some person was the natural, and almost inevitable consequence of the sale of belladonna by means of a false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely-labelled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter: 2 R. S. 662, s. 19. A chemist who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of a person to whom it is administered is guilty of manslaughter: *Tessymond's case*, 1 Lewin's C. C. 169. 'So highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of one person has contributed to the death of another': *Reg.* v. *Swindall*, 2 Car. & Kir. 232, 233. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other: 2 Car. & Kir. 368-71. Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect of the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such immanent danger existed in those cases. In the present case, the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in immanent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution; or that the exercise of that caution was a duty only to his immediate vendee, whose life was not in danger? The defendant's duty arose out of the nature of his business, and the danger to others inci-

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dent to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison mislabelled into the hands of Aspinwall, as an article of merchandise to be sold, and afterwards used, as the extract of dandelion, by some person then unknown. The owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence: *Lynch* v. *Nurdin*, 1 Q. B. 29; *Illidge* v. *Goodwin*, 5 C. & P. 190. The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge: *Dixon* v. *Bell*, 5 M. & S. 198. The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury, and their remedy, would have stood on the same principles if the defendant had given the belladonna to Dr. Foord without price; or if he had put it in his shop without his knowledge: under circumstances which would probably have led to its sale on the faith of the label.

In *Longmeid* v. *Halliday*, 6 Ex. 761, the distinction is recognized between an act of negligence, immanently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not. In the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant on the trial insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be on the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant, and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury; but I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been 'prepared' by his agent Gilbert. The word 'prepared' on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label would have been an open question in an action by the plaintiffs against him; and I wish to be understood as giving no opinion on that point; but it seems to me to be clear that the defendants cannot, in this case, set up as a defence that Foord sold the contents of the jar as and for what the defendant represented

it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgement, on the ground that selling the belladonna without a label indicating that it was a poison was declared a misdemeanour by statute (2 R. S. 694, s. 23), but expressed no opinion upon the question whether, independently of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the case was decided. All the other members of the Court concurred in the opinion of RUGGLES, C. J.

Judgement affirmed.

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If a person brings or accumulates upon his land anything which would not naturally come upon it, and which may become mischievous if not kept under proper control, and it escapes and causes damage to his neighbour, he is liable to an action although he is guilty of no negligence.

Sic utere tuo ut alienum non laedas.

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THIS was a proceeding in Error against a judgement of the Exchequer Chamber, which had reversed a previous judgement of the Court of Exchequer[1].

The judgement of the Exchequer Chamber[2] (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ.), was delivered by BLACKBURN, J., as follows:—

This was a special case stated by an arbitrator, under an order of *nisi prius*, in which the question for the Court is stated to be, whether the plaintiff is entitled to recover any, and, if any, what damages from the defendants, by reason of the matters thereinbefore stated.

In the Court of Exchequer the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. The judgement in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the Court. The only question argued before us was, whether this judgement was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants, by reason of the matters stated in the case, and consequently, that the judgement below should be reversed, but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without

[1] 3 H. & C. 774; 34 L. J. (Ex.) 177. [2] L. R. 1 Ex. 265.

any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case[1], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears, that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill were not used by the persons employed by them, to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but

[1] L. R. 1 Ex. 267-9.

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no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz. whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis maior*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority,

this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. IV, 11. placitum 10, Brian, C. J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant* v. *Goldwin*[1], which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C. J., says: 'It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other.' He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox* v. *Burbidge*[2], Williams, J., says, 'I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.' So in *May* v. *Burdett*[3], the Court, after an elaborate

[1] 2 Ld. Raym. 1089; 1 Salk. 360.

[2] 13 C. B. (N. S.) at p. 438; 32 L. J. (C. P.) 89.

[3] 9 Q. B. at p. 112.

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examination of the old precedents and authorities, came to the conclusion that, 'a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*.' And in 1 Hale's *Pleas of the Crown*, 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner 'must at his peril keep him up safe from doing hurt, for *though he use his diligence* to keep him up, if he escape and do harm, the owner is liable to answer damages'; though, as he proceeds to show, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. *Dig. Droit.* (M. 2) it is said that, 'if the owner of 200 acres in a common moor enfeoffs *B.* of 50 acres, *B.* ought to enclose *at his peril*, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres *at his peril*.' The authority cited is Dyer, 372 b, where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle *at his peril*, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert, *Nat. Brevium*, 128, which is attributed to Lord Hale, it is said, 'If *A.* and *B.* have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively (Dyer, 372; Rastell, *Ent.* 621; 20 Ed. IV, 10), although wild dogs, &c., drive the cattle of the one into the lands of the other.' No case is known to us on which in replevin it has ever been attempted to plead in bar to an avowry for distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar,

the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox* v. *Burbidge*[1], that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant* v. *Goldwin*[2] is an express authority that the duty is the same, and is, to keep them in at his peril.

As Martin, B., in his judgement below appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgement after judgement by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, 'and used (*solebat*) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*iure debuit reparari*).' Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the wall *de iure debuit reparari* by the defendant being an inference of law which did not rise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to

[1] 13 C. B. (N. S.) at p. 438; 32 L. J. (C. P.) 89.
[2] 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod. 311.

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inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that after consideration the Court gave judgement for him on the second ground. In the report of 6 Mod.[1] it is stated, 'And at another day per *totam curiam*: The declaration is good; for there is a sufficient cause of action appearing in it; *but not upon the word solebat.* If the defendant has a house of office inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else.' There is here an evident allusion to the same case in Dyer[2] as is referred to in Com. *Dig. Droit.* (M. 2). Lord Raymond in his report[3] says: 'The last day of term, Holt, C. J., delivered the opinion of the Court, that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgement; *that they did not go upon the solebat, or the iure debuit reparari,* as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because

[1] At p. 314. [2] See *ante*, p. 418. [3] 2 Ld. Raym. at p. 1092.

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every man must so use his own as not to damnify another.' Salkeld, who had been counsel in the case, reports the judgement much more concisely[1], but to the same effect; he says: 'The reason he gave for his judgement was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass.' It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C. J., in the cases already cited in 20 Ed. IV. Martin, B., in the Court below says that he thinks this was a case without difficulty, because the defendant had, by letting judgement go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this

[1] 1 Salk. 361.

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evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapours to arise on his premises, and suffered them to come on the plaintiff's, without stating there was any want of care or skill in the defendant, and that the case of *Tenant* v. *Goldwin*[1] showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by Gibbs, C. J., in *Sutton* v. *Clarke*[2], though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack* v. *White*[3]; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott* v. *London Dock Company*[4]; and many other similar cases may be found. But

[1] 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod. 311.
[2] 6 Taunt. at p. 44.
[3] 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129.
[4] 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.

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we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what primâ facie was a trespass, can be explained on the same principle, viz. that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case.

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgement for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again [1].

Judgement for the plaintiff.

The defendants appealed to the House of Lords.

July 17. THE LORD CHANCELLOR (LORD CAIRNS).— . . . My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the

[1] On a subsequent day (June 18), Manisty, Q.C., stated to the Court that the damages had been agreed at £937.

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owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your lordships, the case of *Smith* v. *Kenrick* in the Court of Common Pleas[1].

On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith* v. *Kenrick*[1] is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird* v. *Williamson*[2], which was also cited in the argument at the bar.

My lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

[1] 7 C. B. 515. [2] 15 C. B. (N. S.) 317.

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The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgement, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: 'We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis maior*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches[1].'

My lords, in that opinion, I must say I entirely concur. Therefore, I have to move your lordships that the judgement of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH concurred.

NOTE.—The Court of Appeal (COCKBURN, C. J., JAMES, MELLISH and

[1] *Supra*, p. 416.

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NICHOLS v. MARSLAND. — Mellish, L. J.

BAGGALLAY, L. JJ.), in *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, laid down an exception to the doctrine of the principal case in the following judgement:

MELLISH, L. J.—This was an action brought by the county surveyor[1] of the county of Chester against the defendant to recover damages on account of the destruction of four county bridges which had been carried away by the bursting of some reservoirs. At the trial before Cockburn, C. J., it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never previous to June 18, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed, the dams at their end gave way, and the water out of the lakes carried away the county bridges lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that if the flood could have been anticipated, the effect might have been prevented[2]. Upon this finding the Lord Chief Justice, acting on the decision in *Rylands* v. *Fletcher*[3] as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The Court of Exchequer have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us.

The appellant relied upon the decision in the case of *Rylands* v. *Fletcher*[3]. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer Chamber[4]:—'We think the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis maior*, or the act of God; but as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient.' It appears to us that we have two questions to consider—First, the question of law, which was left undecided in *Rylands* v. *Fletcher*[3], Can the defendant excuse herself by showing that the escape of the water was owing to *vis maior*, or, as it is termed in the law books, the 'act of God'? And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the king's enemies,

[1] Under 43 Geo. III, c. 59, s. 4.

[2] The judgement of the Court below, read by Bramwell, B., states the finding thus: 'In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis maior*.'

[3] L. R. 3 H. L. 330, and *supra*.

[4] L. R. 1 Ex. at p. 279, and *supra*, p. 416.

the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher*[1] establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher*[1] in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis maior* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is, Did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the

[1] L. R. 3 H. L. 330, and *supra*.

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late case of *Nugent* v. *Smith*[1] we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.

On the whole we are of opinion that the judgement of the Court of Exchequer ought to be affirmed.

Judgement affirmed[2].

As to a further possible limitation of the rule laid down in the principal case see *Eastern and South African Telegraph Company* v. *Cape Town Tramways, &c. Company* (1902), A. C. 381 (P. C.).—[ED.]

1874. BENJAMIN *v.* STORR, L. R. 9 C. P. 400.

In an action for a private injury resulting from a public nuisance the plaintiff must prove (1) that he has suffered a particular injury in excess of the injury to the public; (2) that that injury is an immediate and not merely a consequential result of the wrongful act of the defendant; (3) that the injury is of a substantial character, not fleeting or evanescent.

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The declaration stated that, before and at the time of the happening of the grievances thereinafter mentioned, there was, and still of right ought to be, a certain public highway known as and called Rose Street, and the plaintiff, before, &c., was possessed of a certain coffee-house and premises abutting on and opening into the said highway, and carried on in the said coffee-house the business and trade of a coffee-house keeper; yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his said trade as a coffee-house keeper, from time to time kept and continued to keep divers and an unnecessary number of carts, vans, wagons,

[1] L. R. 1 C. P. D. 423.

[2] The question whether the rule should be made absolute for a new trial, on the ground that the verdict was against the evidence, was reserved for future discussion, if the plaintiff should desire it.

and horses standing in the said highway for an unreasonable and unnecessary length of time, and in such a position as unreasonably and unnecessarily to obstruct the said highway, and the light and air entering through the windows and doors of the said coffee-house of the plaintiff, and the access to the said coffee-house; whereby the plaintiff was and is prevented from carrying on his said trade in so large, ample, and beneficial a manner as he otherwise might and would have done, and lost and had been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to him from carrying on his said trade and business of a coffee-house keeper; and whereby also the said coffee-house and premises had been rendered unhealthy and incommodious as well as a house of business as also as a dwelling-house. Claim, £500, and an injunction to restrain the defendants from a continuance and repetition of the injuries complained of and the committal of other injuries of a like kind.

Plea, not guilty. Issue thereon.

The cause was tried before Honyman, J., at the sittings for Middlesex in Trinity Term last. The facts were as follows:—The plaintiff was a coffee-house keeper in Rose Street, Covent Garden. The defendants were auctioneers having sale-rooms in King Street, with a back or warehouse entrance in Rose Street, close adjoining the plaintiff's premises. The plaintiff had occupied his premises since March, 1870. The defendants and their predecessors had carried on their business since 1830, but of late years much more extensively than formerly. The carriage-way of Rose Street was only about eight feet wide; and when the defendants' vans were there loading or unloading (which was usually from 8.30 a.m. to 7 or 8 p.m. daily), not only was the access to the plaintiff's coffee-house obstructed so as to deter customers from coming there, but the light was diminished to such an extent as to make it necessary to burn gas nearly all day, and the smell arising from the staleing of the horses was excessively offensive; and the consequence of all these accumulated evils was that the takings of the plaintiff's coffee-house were materially lessened.

On the part of the defendants it was proved that the wagons and horses were not kept standing in the street longer than the exigencies of their business required; and it was submitted that in order to maintain the action, the plaintiff must show, not only

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that the thing complained of was a public nuisance (in which case the remedy would be by indictment), but that he had sustained a private and particular injury beyond that suffered by the rest of the public: *Ricket* v. *Metropolitan Railway Company* [1].

The learned judge left it to the jury to say whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience; telling them that they were not to consider solely what was convenient for the business of the defendants.

The jury returned a verdict for the plaintiff, damages £75; and the learned judge reserved leave to the defendants to move 'on the question of the damage being enough to support the action.'

BRETT, J.—This action is founded upon alleged wrongful acts by the defendants, viz. the unreasonable use of a highway—unreasonable to such an extent as to amount to a nuisance. That alone would not give the plaintiff a right of action; but the plaintiff goes on to allege in his declaration that the nuisance complained of is of such a kind as to cause him a particular injury other than and beyond that suffered by the rest of the public, and therefore he claims damages against the defendants. The first point discussed was whether it was necessary that the plaintiff should show something more than an injury to his business, an actual injury to his property; and cases decided under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) were cited. In this case I think the action is maintainable without showing injury to property. In the class of cases referred to, the action is brought to recover compensation for lands taken or injuriously affected; and there, of course, injury to property must be shown, and not merely injury to the trade of the occupier. Those cases, therefore, do not at all affec the present. Before the passing of the Lands Clauses Consolidation Act, by the common law of England, a person guilty of a public nuisance might be indicted; but, if injury resulted to a private individual, other and greater than that which was common to all the queen's subjects, the person injured had his remedy by action. The cases referred to upon this subject show that there are three things which the plaintiff must substantiate,

[1] L. R. 2 H. L. 175.

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beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to show that he suffers the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway. The case of *Hubert* v. *Groves*[1] seems to me to prove that proposition. There, the plaintiff's business was injured by the obstruction of a highway, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie. *Winterbottom* v. *Lord Derby*[2] was decided upon the same ground; the plaintiff failed because he was unable to show that he had sustained any injury other and different from that which was common to all the rest of the public. Other cases show that the injury to the individual must be direct, and not a mere consequential injury; as, where one way is obstructed, but another (though possibly a less convenient one) is left open; in such a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shown to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial. The question then is, whether the plaintiff here has brought himself within the rule so laid down.

The evidence on the part of the plaintiff showed that from the too long standing of horses and wagons of the defendants in the highway opposite his house, the free passage of light and air to his premises was obstructed, and the plaintiff was in consequence obliged to burn gas nearly all day, and so to incur expense. I think that brings the case within all the requirements I have pointed out; it was a particular, a direct, and a substantial damage. As to the bad smell, that also was a particular injury to the plaintiff, and a direct and substantial one. So, if by reason of the access to his premises being obstructed for an unreasonable time and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial

[1] 1 Esp. 148. [2] L. R. 2 Ex. 316.

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damage. As to that part of the rule which seeks to enter a non-suit, assuming the evidence objected to to have been properly received, I think it cannot be sustained.

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DENMAN, J., delivered judgement to the same effect, and *the Rule was discharged.*

1865. ST. HELEN'S SMELTING COMPANY *v.* TIPPING, 11 H. L. C. 642; 11 Eng. Rep. 1483.

In an action for a nuisance producing only personal discomfort the circumstances of the locality and the nature of the trades carried on there must be taken into account in determining the right of the plaintiff to recover; but where the nuisance amounts to a sensible injury to property these considerations are immaterial.

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This was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops by their works. The defendants are the directors and shareholders of the St. Helen's Copper Smelting Company (Limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor house and about 1,300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that, 'the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling house and lands of the plaintiff, and caused large quantities of noxious gases, vapours, and other noxious matter, to issue from the said works, and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage, were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed, and also the reversionary lands and premises were depreciated in value.' The defendants pleaded, Not guilty.

The cause was tried before Mr. Justice Mellor at Liverpool in August 1863, when the plaintiff was examined and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapour, which, when the wind was in a particular direction, affected persons as well as plants in his

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grounds. On cross-examination, he said he had seen the defendants' chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was called to show that the whole neighbourhood was studded with manufactories and tall chimneys, that there were some alkali works close by the defendants' works, that the smoke from one was quite as injurious as the smoke from the other, that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury [that an actionable injury was one producing sensible discomfort[1];] that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbours; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, 'whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner.' The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative. Whether the

[1] These words seem to have crept in by some reporter's error, as they do not appear in the full report of the summing-up in 12 L. T. (N. S.) at p. 777. They seem to have been taken from the statement of the grounds upon which the defendants moved for a new trial.—[ED.]

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business there carried on was an ordinary business for smelting copper, and the answer was, 'We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible.' But to the question whether the jurors thought that it was carried on in a proper place, the answer was, 'We do not.' The verdict was therefore entered for the plaintiff, and the damages were assessed at £361 18*s.* 4½*d.* A motion was made for a new trial, on the ground of misdirection, but the rule was refused: 4 Best and Sm. 608. Leave was however given to appeal, and the case was carried to the Exchequer Chamber, where the judgement was affirmed, Lord Chief Baron Pollock there observing, 'My opinion has not always been that which it is now. Acting upon what has been decided *in this Court*, my Brother Mellor's direction is not open to a bill of exception': 4 Best and Sm. 616. This appeal was then brought.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee, attended.

THE LORD CHANCELLOR (LORD WESTBURY).—My Lords, as your lordships, as well as myself, have listened carefully to the able argument on the part of the appellants, and are perfectly satisfied with the decision of the Court below, and are of opinion that, subject to what we may hear from the learned judges, the direction to the jury was right, I would submit that two questions should be put to the learned judges; but at the same time the learned judges will be good enough to understand that if they desire further argument of the case the respondent's counsel must be heard. Otherwise the following are the questions which I propose to be put to them: Whether directions given by the learned judge at *nisi prius* to the jury were correct? or, Whether a new trial ought to be granted in this case? The learned judges will intimate to your lordships whether they desire to hear further argument on the part of the respondent's counsel, or whether they are prepared to answer the questions put to them by your lordships.

MR. BARON MARTIN said that the judges did not require the case to be further argued, but they requested to have a few moments' consideration to give their answer to the questions put to them.

Adjourned for a short time, and resumed.

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MR. BARON MARTIN.—My Lords, in answer to the questions proposed by your lordships to the judges, I have to state their unanimous opinion that the directions given by the learned judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

THE LORD CHANCELLOR (July 5).—My Lords, I think your lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.

My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society

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to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June 1860. In the month of September 1860 very extensive smelting operations began on the property of the present appellants, in their works at St. Helen's. Of the effect of the vapours exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighbourhood where these copper smelting works were carried on, is a neighbourhood more or less devoted to manufacturing purposes of a similar kind, and therefore it is said, that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word 'suitable,' or the meaning of the word 'convenient,' which has been used as applicable to the subject. The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgement of the learned judges in the Court below), I advise your lordships to affirm the decision of the Court below, and to refuse the new trial, and to dismiss the appeal with costs.

LORD CRANWORTH.—My Lords, I entirely concur in opinion with my noble and learned friend on the Woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mellor, J. He says, 'It must be plain, that persons using a limekiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place.' I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honour of being one of the Barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke, in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, 'You must look at it not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields'; because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mellor, J., and I do not think he could possibly have stated the law, either abstractly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE.—My Lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: The defendants say,

1865.

ST. HELEN'S SMELTING COMPANY v. TIPPING.

Lord Wensleydale.

'If you do not mind you will stop the progress of works of this description.' I agree that it is so, because, no doubt, in the county of Lancaster above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, 'I will bring an action against you for this and that, and so on.' Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.

My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgement of the Exchequer Chamber affirming the judgement of the Court of Queen's Bench affirmed; and *appeal dismissed with costs.*

1894. LAMBTON *v.* MELLISH, L. R. (1894) 3 Ch. 163.

Where the aggregate of the acts of persons acting independently amounts to a nuisance each of them is severally liable therefor, although the separate acts might not be actionable *per se.*

1894.

LAMBTON v. MELLISH.

The plaintiff was the lessee and occupier of a house adjoining Ashstead Common in Surrey. The premises of the defendant Mellish were about 60 or 70 yards from the plaintiff's premises, and those of the defendant Cox were about 120 or 130 yards from the plaintiff's premises and about 100 yards from those of the defendant Mellish, and were separated from both by a line of railway.

It appeared that during the summer months a large number of school treats and assemblages of that description took place on Ashstead Common.

The defendants Mellish and Cox were rival refreshment contractors who catered for visitors and excursionists to the common, and both the defendants had merry-go-rounds on their premises, and were in the habit of using organs as an accompaniment to the amusements.

It appeared from the evidence that these organs were for three months or more in the summer continuously being played together from 10 or 11 a.m. till 6 or 7 p.m., and that the noise caused by the two organs was 'maddening.'

The organs used by Mellish had been changed, and it was alleged by him that the organ in use when the motion was made was a small portable hand-organ making comparatively little noise. That used by Cox was a much larger one provided with trumpet-stops and emitting sounds which could be heard at the distance of one mile.

The plaintiff now moved against the defendant in each action for an injunction restraining him from playing any organs so as to cause a nuisance or injury to the plaintiff or his family, or other the occupiers of the plaintiff's property.

CHITTY, J.—Notwithstanding the conflict of evidence, I am of opinion that the plaintiff is entitled to the injunction he asks for as against the defendant in each action.

A man may tolerate a nuisance for a short period. A passer-by or a bystander would not find any nuisance in these organs; but the case is very different when the noise has to be continuously endured: under such circumstances it is scarcely an exaggeration to term it 'maddening,' going on, as it does, hour after hour, day after day, and month after month. I consider that the noise made by each defendant, taken separately, amounts to a nuisance. But I go further. It was said for the defendant Mellish that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination each would be a wrongdoer. If a man shouts outside a house for most of the day, and another man, who is his rival (for it is to be remembered that these defendants are rivals), does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense it must be the other way. Each of the men is making a noise and each is adding his quantum until the whole constitutes

1894.

LAMBTON v. MELLISH. — Chitty, J.

a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion each is separately liable, and I think it would be contrary to good sense, and, indeed, contrary to law, to hold otherwise. It would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by James, L. J., in *Thorpe* v. *Brumfitt* [1]. That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says [2]: 'Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.' There is in my opinion no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions in the terms of the notices of motion.

[1] L. R. 8 Ch. 650.

[2] L. R. 8 Ch. 656.

1899. Canadian Pacific Railway Company v. Parke, L. R. (1899) App. Cas. 535 (J. C.).

Whether an act amounting to a nuisance is justified or not by statute is a question of construction in each case. When the terms of the statute confer an absolute power, which is exercised without negligence, the nuisance is justified. Where the terms are permissive merely, the proper inference is that the power must be exercised subject to the common law rights of other persons.

1899.

Canadian Pacific Railway Company v. Parke.

Appeal from a decree of the Supreme Court (Oct. 16, 1897) dismissing an appeal from a decree of Drake, J. (Jan. 29, 1897). The question determined in this appeal was whether the respondents, who had a statutory right to bring water upon their lands for agricultural purposes, were protected from liability for damage caused to the appellant railway so long as they exercised their statutory right in the manner permitted to them by the legislature without negligence on their part.

The facts of the case and the proceedings in the action are stated in the judgement of their lordships.

The statutory right in question was conferred by No. 144 of Laws of British Columbia, June 1, 1870, consolidated 1871, ss. 30–6. There have been a series of amending and consolidating Acts since that date, the material passages of which are referred to by their lordships.

At the trial the judge found that, apart from the statutory rights of the respondents, the appellants had made out a case for relief. But he came to the conclusion that the statute authorized the respondents to bring the water on to their land, even although its escape might result in serious damage to the appellants, and thus took away the appellants' right to relief.

The Full Court affirmed this conclusion.

The judgement of McCreight, J., concludes: 'I agree with the learned trial judge that this is a case of *damnum sine iniuriâ*, for it is admitted that the defendants have not acted negligently, and I think the case to which he refers of *National Telephone Company* v. *Baker*[1] applies; and I will only add the remark made by Lord Blackburn in *Metropolitan Asylums District* v. *Hill*[2], that "it is clear

[1] L. R. [1893] 2 Ch. 186.

[2] L. R. 6 App. Cas. 208.

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that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication such an intention appears.'"

The judgement of their lordships (LORD HALSBURY, L. C., and LORDS WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND and DAVEY) was delivered by

LORD WATSON.—The appellants are owners of the Dominion Railway, known as the Canadian Pacific Railway, which, in its course through the Yale district of British Columbia, passes near to the Thompson river at the distance of about half a mile from the lands belonging to the respondents, which lie to the eastward.

The respondents' ranch, which appears to be about 320 acres in extent, is situated—to use provincial phraseology—upon benches, or, in other words, upon a series of table-lands, rising gradually to the eastward, above the level of the Thompson river. The land was originally acquired from the Crown, under a pre-emption title, by one William Rice Puckett, before the province of Columbia had been admitted into the Union. Puckett, in the year 1872, transferred his interest to James Robinson; and, in July 1884, Robinson transferred his interest to T. G. Kirkpatrick, who, in April 1894, sold and transferred his interest in the same to the respondents, the transfer being duly recorded.

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In the valley of the Thompson river, and in other districts of British Columbia, irrigation is indispensably necessary in order to develop the fertility of the soil. Accordingly there have been a considerable number of provincial Acts passed from time to time in order to sanction and regulate water privileges. Their lordships have not thought it necessary to refer to these in detail, but have noticed all the statutory enactments to which their attention was directed in the argument upon this appeal.

Puckett, the original pre-emptor of the lands now belonging to the respondents, on November 21, 1868, acquired a record of 300 inches of water to be taken from McCallum's Creek, and, on April 10, 1871, he acquired a record of 300 inches of water to be taken from McCallum's and Pennie's Creek, for the purpose of

irrigating the lands. The respondents, as his successors, have now right to the water privileges which were so acquired by him.

The Canadian Pacific Railway, as it passes the lands of the respondents, was constructed by the Dominion Government, and was thereafter transferred to the appellant company, and opened for traffic in the year 1886. The railway, and the whole undertaking now carried on under the name of the Canadian Pacific Railway, were, by patent of Her Majesty, under the Great Seal of Canada, dated May 25, 1896, granted to the appellant company. The grant was made under the proviso that 'should our title to any portion or portions of the said tract of land hereby granted be found to be defective, neither the company, nor its successors or assigns, shall have any claim in respect thereof by virtue of anything contained in these presents.' No question arises in this action as to any defect of the Crown title, the only question relating to the powers which the respondents are entitled to exercise by virtue of the water privileges attached to their lands.

The appellant company brought their writ on July 20, 1895, and an amended statement of claim was delivered on October 27, 1896, before the Supreme Court of British Columbia. The amended statement sets forth that the respondents brought large quantities of water upon their lands for the purposes of irrigation; that they did not carry off the surplus water by means of flumes, ditches, or drains, but allowed it to mingle with the subsoil, with the result of causing a slide of the land in the direction of the Thompson river, and thereby occasioning, from time to time, serious damage to the line of railway. The appellant company claimed: 'that the defendants, their servants, agents, and workmen, be restrained, by the order of this Honourable Court, from continuing to bring water upon their lands, and to allow such water to escape to the plaintiffs' line of railway, and to cause landslides thereon as mentioned.'

The case went to trial, at Vancouver, before Drake, J., and a special jury. The learned judge submitted these two questions to the jury: '(1) Is the water brought by the defendants upon their land for the purpose of irrigation the sole cause of the damage done to the plaintiffs' line of railway by the slide in question? (2) Is the water brought by the defendants on their land for the purpose of irrigation the substantial cause of the damage done to

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the plaintiffs' line of railway by the slide in question?' The jury answered the first question in the negative, and the second in the affirmative.

The learned judge who presided at the trial, having considered the verdict returned by the jury, refused the injunction craved, and dismissed the appellants' action with costs. On appeal, the Full Court of British Columbia, consisting of McCreight, Walkem, and McColl, JJ., affirmed, with costs, the judgement of Drake, J.

. . . . . .

In coming to the conclusion that the application of the appellant company ought to be dismissed, Drake and McCreight, JJ., with whom Walkem, J., agreed, proceeded solely upon the ground that the British Columbian legislation which has been already referred to gives to the holder of land under a pre-emption title, who has taken a supply of water for irrigation purposes and has recorded his privilege in accordance with its provisions, an absolute right to use for irrigation the water so taken by him, no matter how injurious the use may be to neighbouring landowners, and that he was under no liability to compensate them for the injury done, unless it were shown that his use was negligent. In other words, they held that his irrigating the surface of his land, by bringing to and pouring upon it foreign water, which immediately percolated to the substratum of silt, with which it mingled, and then escaped from his land as liquid mud, and seriously damaged the adjoining land, was the necessary consequence of his exercising his statutory right, and did not constitute negligence, or afford the owner of the adjoining land any cause of action. McColl, J., without expressing the same conclusion, proceeds to consider whether the appellant company would have been entitled to an injunction if they had offered to make compensation to the respondents in ceasing to irrigate so as to cause a land-slide, and the consequent destruction of the railway-line. The learned judge, however, does not go so far as to solve the question, seeing it had not been argued, and his brethren had been able to come to the conclusion that the judgement should be affirmed. It may be added that the record in this appeal contains no materials for raising the question which was discussed by the learned judge.

Their lordships think that the judges of the Supreme Court were right in considering the crucial question in this case to be whether

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the Columbian legislation which they had to construe was, as between the person using the powers hereby conferred and the owners of adjacent lands, imperative, or merely permissive. They examined the leading authorities bearing upon the point, and their conclusion, as expressed by Drake, J., was: 'The difference in the present case is that there is no direction that irrigation waters should be used, but only a permission to use them; *but the permission to use implies a legal right of use which will bar an action for damages when the use has been non-negligent.*' The proposition is somewhat too broadly stated. Wherever, according to the sound construction of a statute, the legislature has authorized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

The leading authorities in the law of England upon this question, which though not numerous are of considerable weight, are *Managers of Metropolitan Asylums District* v. *Hill*[1] and *London, Brighton and South Coast Railway Company* v. *Truman*[2]. In the first of these cases, the managers were authorized by a public Statute 30 and 31 Vict. c. 6, no locality being specified, to erect hospitals for the reception of the sick poor of the metropolis. In virtue of these statutory powers, they commenced the erection of a small-pox hospital at Hampstead, when an injunction was applied for by the respondents, who were the proprietors of houses in the vicinity. At the trial, it was found by a jury that the hospital was, or would be, to the nuisance of the respondents. The House of Lords decided in favour of the respondents upon the express ground that the statute was permissive, and gave the managers no authority to erect a hospital which was injurious to neighbouring proprietors. The Lord Chancellor (Selborne) said[3]: 'I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent.'

In the same case Lord Blackburn said[4]: 'It is clear that the burden lies on those who seek to establish that the legislature

[1] L. R. 6 App. Cas. 193.
[2] L. R. 11 App. Cas. 45.
[3] L. R. 6 App. Cas. 202.
[4] L. R. 6 App. Cas. 208.

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intended to take away the private right of individuals to show that by express words, or by necessary implication, such an intention appears.' The noble and learned lord also observed[1]: 'The legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.'

In the second case, a railway company were empowered, by a local and personal Act, passed after due inquiry, to purchase additional lands not exceeding fifty acres for the purposes, *inter alia*, of receiving, depositing, or keeping any cattle, or any goods conveyed or intended to be conveyed on the railway. They were required by the Act to sell superfluous lands within ten years from its passing. Under that power they purchased between two and three acres of ground adjacent to one of their stations. For nearly ten years the ground was used as a market-garden, when the company devoted the land to the purposes of their cattle traffic, and constructed a yard or dock for the cattle carried by them. Certain occupiers of houses in the neighbourhood of the yard, who complained of it as constituting a nuisance, but did not allege negligence on the part of the company in using it, applied for an injunction, which was granted by North, J., and his decision was affirmed by the Court of Appeal. Their decisions were reversed by the House of Lords, who held that the provisions of the Act which related to the acquisition and use of the yard were intended by the legislature to be imperative in the same sense as its provisions relating to the use of the railway, and that, no negligence having been shown on the part of the company, the injunction ought to be refused.

In the present case the legislation of British Columbia is perfectly general, and applies to all lands within the province which had been, or at any future time might be, acquired by a subject under a pre-emption title from the Crown. It provides that the proprietor of land held under that title, with consent of the commissioner, and upon making payment of compensation, may com-

[1] L. R. 6 App. Cas. 203.

pulsorily divert water from any stream, lake, or river adjacent, and may convey it to his own land for the purpose of irrigation; and he has also the right, if lawfully occupying and cultivating his own land, to convey the water through or over land which does not belong to him, upon paying due compensation for waste or damage. Then the statute of 1882 empowers him, after the water has been used for irrigation, to run the surplus or waste water through the adjacent lands by means of flumes, ditches, or drains, subject to the same provisions as to compensation.

The legislation in question, in so far as its provisions relate to the use of the water by the irrigator after it has been conveyed to his own land, is undoubtedly conceived in language which is permissive. He is allowed to use it for the ordinary purposes of irrigation, which primâ facie imply that the water is to be distributed over and absorbed by the soil; and it is a circumstance not to be overlooked in construing these statutory provisions that the legislature has contemplated and has provided compulsory means of carrying off surplus water, which has not been absorbed by the soil, by flumes, ditches, or drains through the adjacent lands of other owners. The real question, therefore, in this case comes to be, whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. The respondents contended for the second of these alternatives, which has been adopted by the Courts below; but, in order to justify their contention, it is incumbent upon them to show that the legislature deliberately intended to take away the rights of individuals to protect their property against invasion. The respondents maintain that, so long as they are not negligent, the legislature has given them the absolute privilege, for the consequences of which they are not responsible, of causing, by means of their irrigation, a landslip which will have the ultimate effect of carrying the lands situated at a lower level than their own, together with all the erections upon them, whether consisting of houses or railways, into the Thompson river.

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Their lordships have been unable to discover, in the statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own soil with foreign water was meant by the Legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator. It is evident that no such circumstances occur in this case as led to the decision of the House of Lords in *London, Brighton and South Coast Railway Company* v. *Truman*[1]. The company could not, under the power conferred upon them, acquire and use additional land for the enlargement of one of their stations without incurring a statutory obligation to the public to use that additional land as part of their railway, so long as their line was open for the accommodation and conveyance of traffic. The land added was, in these circumstances, just part of the railway, and within the principle of *Hammersmith and City Railway Company* v. *Brand*[2]. In the present case the irrigator is at liberty, subject only to the consent of a commissioner, who is not charged with the duty of seeing that no injury results to lands adjacent to those which are to be irrigated, to determine the quantity of water he desires to appropriate, the means by which it is to be conveyed to his land, and the means by which surplus or waste water is to be discharged. When the water has been conveyed to his land he is authorized to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands.

Their lordships will humbly advise Her Majesty to reverse the judgement appealed from; to grant an injunction restraining the respondents, their servants, agents, and workmen, from so irrigating the respondents' lands as to cause a land-slide or slip, and thereby to injure the appellant company's line of railway; and to order that the respondents do pay to the appellant company their costs of action in both Courts below. The respondents must pay to the appellant company their costs of this appeal.

[1] L. R. 11 App. Cas. 45. [2] L. R. 4 H. L. 171.

1881. DALTON *v.* ANGUS, L. R. 6 A. C. 740.

The owner of land has a natural right in respect of it to the lateral support of the adjoining land of his neighbour. He has no such natural right of support for buildings upon his land. Such right can, however, be acquired by prescription at common law, or (possibly) under the Prescription Act, if enjoyed openly and without concealment, although it may have been practically impossible for the owner of the servient tenement to interrupt such enjoyment.

1881.

DALTON *v.* ANGUS.

These were two appeals from a judgement of the Court of Appeal. The action was brought by *Angus & Co.* against *Dalton* and the Commissioners of Her Majesty's Works and Public Buildings for damages in respect of injuries to the plaintiffs' coach factory, and was tried before Lush, J., at the Newcastle Summer Assizes, 1876.

For the purposes of this report the following statement of facts taken from the headnote of the report in A. C. will suffice :—

Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory.

Lush, J., at the trial, directed the jury to find a verdict for the plaintiffs for the damages claimed, subject to a reference as to the amount. The Queen's Bench Division (Cockburn, C. J., and Mellor, J., diss. Lush, J.) ordered judgement to be entered for the defendants [1]. The Court of Appeal (Cotton and Thesiger, L. JJ., diss. Brett, L. J.) reversed this judgement, and ordered that the

[1] L. R. 3 Q. B. D. 85.

1881.

DALTON v. ANGUS.

defendants should elect within fourteen days whether they would take a new trial, and, if they did not so elect, that judgement should be entered for the plaintiffs for £1,943, the damages assessed by the special referee, but without prejudice to the defendants' proceedings in reference to the amount of damages [1].

LORD BLACKBURN.—My Lords, the first of the defences raised by the pleadings is a denial that the plaintiffs were entitled to have their buildings supported by the land adjacent thereto. It is on this defence that the most difficult questions arise, and I shall consider it first.

It is, I think, conclusively settled by the decision in this House in *Backhouse* v. *Bonomi* [2] that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land; but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or rather perhaps cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another he gives the person to whom it is conveyed (unless the contrary is expressed) not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on such terms as to prevent any such right arising (see *Rowbotham* v. *Wilson* [3]; *Smith* v. *Darby* [4]; it

[1] L. R. 4 Q. B. D. 162, 204.
[2] 9 H. L. C. 503.
[3] 8 H. L. C. 348.
[4] L. R. 7 Q. B. 716.

1881.

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Eadon v. *Jeffcock*[1]; *Aspden* v. *Seddon*[2]). But the burthen both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Backhouse* v. *Bonomi*[3] also conclusively settles this, that though the right of support to a building is not of common right and must be acquired, yet, when it is acquired, the right of the owner of the building to support for it is precisely the same as that of the owner of land to support for it. Both Lord Cranworth and Lord Wensleydale say that this right also is more properly to be called a right of property to be respected by the owner of the adjoining land than a negative easement of servitude *ne facias*. Lord Wensleydale could not mean to say that the right of support to a house was of common right, and so overrule several authorities, including *Gayford* v. *Nicholls*[4], where he himself had delivered judgement.

In the case now before your lordships, nothing was proved which could have given rise to this right unless it arose from enjoyment in the manner and subject to the conditions and for the time required by law to give a title by prescription. And inasmuch as it was clearly proved that, though there had been more ancient buildings on the spot, they were removed, and buildings of a different structure and requiring a different degree of support were erected in their place only twenty-seven years before the excavations complained of, it seems to me clear that the buildings are not ancient buildings in the sense that they or similar buildings, for which in the course of repair they were substituted, had stood there from time beyond memory. The plaintiffs must (unless the construction of 2 & 3 Will. IV, c. 71, is such as to embrace such a case as this) rely on the comparatively modern doctrine, by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory.

I do not understand the late Lord Chief Justice Cockburn to doubt that such a right as that now in question might be acquired, according to English law, where the building had stood from time immemorial, by enjoyment open and peaceable from time immemorial. It was questioned on the argument at the bar of this

[1] L. R. 7 Ex. 379.
[2] L. R. 10 Ch. 394.
[3] 9 H. L. C. 503.
[4] 9 Ex. 702.

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House, whether a right of support for a building could be acquired by any length of enjoyment, even from time immemorial, and I shall consider that later. But the Lord Chief Justice, I think, denied that this right could be acquired by enjoyment for a less time than time immemorial. He said that such enjoyment might give rise to a presumption that there was originally a grant, or at least an assent in point of fact to the enjoyment, but said that when it was proved, or what comes to the same thing, admitted, that the assent of the defendants' predecessors was not asked for, or obtained by grant or in any other way, the presumption was at an end. This is expressed[1] in terms confined to this particular right, but I think his position is general, and applies to every easement, unless it is claimed under Lord Tenterden's Act. This requires examination.

The English Common Law is stated by Lord Coke[2]. He says, to make prescription, two things are incidents inseparable, possession or usage, and time. Possession must be long, continual, and peaceable. As to 'long,' Lord Coke says: 'It is the time given by law, which in England is the time whereof there is no memory of man to the contrary.' But though living memory might not be to the contrary, yet if written evidence showed that the possession had a beginning, it was defeated. By what Cockburn, C.J., seems to think a judicial usurpation of legislative power, the time of legal memory was fixed to be the same as the limitation of real actions by the Statute of Westminster (A.D. 1275), viz., the time of Richard I, A.D. 1189. This, when first introduced, gave a prescription of about eighty-six years, but being a fixed date it became longer and longer, and already when Littleton wrote, in the reign of Edward IV, he observes on the inconvenience felt, because the time of limitation of a writ of right is of so long time past.

This inconvenience must have been particularly felt with regard to any rights attached to buildings. For though a few buildings which existed in 1189 still exist, and there are some old cities and towns (not of very great extent) which then existed, and in which it is possible that the ancient buildings have been from time to time repaired without altering their structure, yet far the greater part of the buildings in England stand on land which can be shown to have been first built upon at a much later date.

[1] L. R. 3 Q. B. D. at p. 118.

[2] Co. *Lit.* 113 b, 114 a.

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In *Bedle* v. *Beard*, A.D. 1606[1], it was held that, though it was proved that there was a time within legal memory when the right claimed had not existed, and consequently the right could not have its origin in prescription, long possession was a sufficient ground for presuming what was necessary to make that possession lawful; and consequently, in that case, where there had been possession for 303 years, for presuming a grant from the crown, though none was shown. 'This,' says Lord Coke, 'was resolved by Lord Ellesmere, with the principal judges, and on consideration of precedents.' So that the doctrine was not then introduced for the first time. But the length of time necessary to give rise to such a prescription was left indefinite, and though I think no one, in that case, could have really believed that there actually had been a grant from the crown which was lost, that is not said, and it may have been thought that long user was evidence by which the fact might be proved, but that it should not be found unless believed. The modern doctrine that a jury ought to be directed that if they believed that there had been what was equivalent to adverse possession as of right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant, must certainly have been introduced after the passing of the Statute of Limitations, 21 Jac. I, c. 16 (A.D. 1623), and as the earliest reported decision is that of *Lewis* v. *Price* in 1761, referred to in Serjeant Williams's note to *Yard* v. *Ford*[2], the doctrine is probably not much more than a century old. I quite agree with what is said by the late Chief Justice Cockburn[3], that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, 'no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction.' He thinks that thus to shorten the period of prescription without the authority of the legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally

[1] 12 Co. Rep. 5.

[2] 2 Wms. *Saund.* 504, edition 1871.

[3] L. R. 3 Q. B. D. at p. 105.

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a blunder, and inconvenient, *communis error facit ius*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the legislature as it was at first to introduce that fiction.

It is difficult to reconcile all the *dicta* and decisions on the subject. There is language used in *Darwin* v. *Upton*, reported by Serjeant Williams in his note to *Yard* v. *Ford*[1], as to the difference between an absolute bar and a presumptive bar which I have never been able to understand. I quite agree that where the evidence is such as to leave it a question whether the enjoyment has been such—open, peaceable, and continual—as to raise a presumption of the right, the jury must be asked to find as a fact whether the enjoyment was of that kind; but the late chief justice seems[2] to understand *Darwin* v. *Upton*[1] as amounting to this, that the jury should be told that if the enjoyment has been such as to raise a presumption of a right they may find a grant whether they believe in its existence or not; but that, if they choose to be scrupulous, they need not so find. I cannot believe that the judges meant that, and if they did, I think the subsequent cases are inconsistent with that ruling. I would more particularly rely on what is said by Bayley, J., in *Cross* v. *Lewis*[3]. The judges never altered the form of pleading, and it was still necessary for a defendant setting up a right as a defence, to plead it with particularity: see *Hendy* v. *Stephenson*[4]. In *Campbell* v. *Wilson*[5] the defendant pleaded, first, a way by prescription, which was traversed; and, secondly, that Bryan Grey was seised in fee of the *locus in quo*, and that Joseph Wilson (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining moss dale, and that by deed, lost by time and accident, Bryan Grey granted a right of way over the *locus in quo* to Joseph Wilson and his heirs. The replication traversed the grant. At the trial in 1803, before Chambre, J., it appeared that in 1778, by an award made under an Inclosure Act, all ways not set out in the award were extinguished. And this way was not set out in the

[1] 2 Wms. *Saund.* 507, edition 1871.
[2] L. R. 3 Q. B. D. at p. 107.
[3] 2 B. & C. 686.
[4] 10 East, 55.
[5] 3 East, 294.

award. This put an end to the plea of prescription, and it would also have put an end to the second plea, unless the alleged grant by Bryan Grey was made subsequent to the award, that is, within twenty-five years next before the trial, and, of course, within less than that time before the plea was pleaded, in which it was alleged that the deed was lost by time and accident. But evidence was given that there had been, for more than twenty years, an adverse enjoyment of the right of way. Now, if the issue joined was to be understood in its literal and natural sense, it could hardly have been suggested that this was evidence to justify the judge in leaving it to the jury whether, in fact, in the short interval between the making of the award and the commencement of the twenty years' enjoyment, not more than two or at most four years, there actually had been a grant since lost. But so to construe the issue would have made the question of whether there was a right, to depend on the accident of whether the right was set up by a plaintiff complaining of an obstruction to it, or a defendant justifying under it. Chambre, J., who was a very learned pleader, does not seem to have had the least doubt of the meaning of the issue. He never said one word to the jury as to the reality of the grant, but left it to them to presume it, if satisfied that the enjoyment was adverse, and had continued twenty years before the action. And this direction was approved of by Lord Ellenborough and the whole Court of King's Bench, the only question on which they seem to have had any difficulty being as to whether there was a proper direction given as to the nature of the enjoyment which would give rise to the presumption that the defendant acted by right. And in *Penwarden* v. *Ching*[1], where issue was taken on a plea justifying a trespass in defence of an ancient window, and on the trial in 1829 it was proved before Tindal, C. J., that the window was first erected in 1807, that learned judge said that 'The question is not whether the window is what is strictly called ancient, but whether it is such as the law, in indulgence to rights, has in modern times so called, and to which the defendant has a right, for this is the substance of the plea.' The verdict was for the plaintiff, so that this ruling could not be reviewed, but it was the ruling of a judge who was a very learned pleader. In both those cases, and in many more, if the question had been whether there really in fact had

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[1] Mood. & M. 400.

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been a grant, or really in fact the window was ancient, there could have been no possible question. It was, no doubt, desirable that such artificial doctrines should be dispensed with. Lord Tenterden's Act (2 & 3 Will. IV, c. 71), so far as it went, made that a direct bar which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done: see *Aynsley* v. *Glover*[1]. I think the law, as far as regards this subject, is the same as it was before that Act was passed. Neither can I agree with what seems thrown out by Lush, J., rather as a makeweight than as a substantial ground of decision, that the more recent Limitation Act (3 & 4 Will. IV, c. 27), which put an end to the doctrine of adverse possession, has made any difference in the law. This view of the matter renders it unnecessary to decide anything as to the construction of Lord Tenterden's Act (2 & 3 Will. IV, c. 71), and I wish to say nothing that may prejudice the decision of that question if hereafter it becomes material.

I scarcely think that, if this had been the only point argued at your lordships' bar on the first occasion, it would have been thought of sufficient difficulty to ask the opinions of the learned judges. But it is satisfactory to find that they all agree that a building, which has *de facto* enjoyed (under the circumstances and conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had.

I am glad that the recent alterations in the law have obviated the necessity of putting such very artificial constructions on issues as I have mentioned. But I am not able to agree with Bowen, J., in thinking that the alterations in the modes of procedure and the fusion of law and equity have made any alteration in the substance of the law. I quite agree with him in thinking that circumstances might, and often did, give rise to an equity to protect a house which would not have given rise to a legal claim to maintain an action at law. But those circumstances must always have existed in fact, and generally there must have been

[1] L. R. 10 Ch. 283.

notice of them. I cannot think the alterations in procedure have altered the law.

On the first argument at the bar of this House in November, 1879, when the lords present were the then Lord Chancellor (Earl Cairns), Lord Penzance, and myself, a very able argument was addressed to this House by the then Attorney-General[1] and the now Solicitor-General[2], and at the close of it the Lord Chancellor summarized the argument (I took a note of it at the time), and asked if this was a correct statement of their proposition—'In order to gain for the owner of land, by enjoyment, a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the advantage must be one the enjoyment of which is or ought to be known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him.' And this was accepted by the Attorney-General as truly representing the argument. As 2 & 3 Will. IV, c. 71, was couched in terms which, as it has been held, prevented its applying to this case, it might be necessary in considering this proposition, to decide questions of great importance, which had never yet been finally decided; and, therefore, it was deemed advisable to have the assistance of the learned judges, and a further argument was ordered.

I do not think anything was said at the second argument that was not involved in the summary of the first argument which I have above quoted. It was admitted that if the proposition was correct, no lapse of time, not even from time immemorial, could give a right of support to a building, such as to oblige the owners of adjoining land to respect it; and that the same would have been before 2 & 3 Will. IV, c. 71, and still was in cases not within its provisions, the law as to the acquisition by enjoyment of the right to require the neighbours to respect the access of light and air to a window, unless it made a difference that the enjoyment in this latter case could be easily interrupted. And reference was made to cases which were said to be analogous, such as that of keeping land undrained, so as to act as a reservoir for springs: *Chasemore* v. *Richards*[3]; or that of claiming to have uninterrupted the access for the wind to a windmill: *Webb* v. *Bird*[4]; and it

[1] Sir John Holker. [2] Sir F. Herschell. [3] 7 H. L. C. 349.
[4] 13 C. B. (N. S.) 841; 31 L. J. (C. P.) 335.

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was said that the principle on which those cases were decided was one which showed that there was no right of support acquired by the common law prescription for a building, though it had stood from time immemorial, and if that was so, there could be none by the prescription for a shorter period created by the modern decisions; for I agree with Bramwell, L. J., where, in *Bryant* v. *Lefever*[1], he says that what he calls the expedient, introduced by these decisions, is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from time immemorial, and is therefore only applicable where the right claimed is such as, if immemorial, might have been the subject of prescription.

My lords, during the very considerable interval that elapsed between the first argument in November, 1879, and the time when the opinions of the learned judges were delivered, March 15, 1881, I have at intervals bestowed consideration on this proposition, and though I refrained from finally coming to a decision till I had the advantage of considering their opinions, I was strongly impressed with the conviction that such a right as is here claimed was, according to the established law of England, one which might be acquired by prescription. And I find that all the judges agree in that result, though not entirely for the same reasons, and I am not sure that any of them would have quite assented to the train of reasoning which has led me to that same result. On a minor point—whether there should be a new trial because the judge at the trial left no question to the jury when, as it was said, there was or might have been evidence produced which would raise a question of fact which might have been a defence—the learned judges are divided in opinion; Lindley, Lopes, and Bowen, JJ., agreeing with the majority of the Court of Appeal that there should be a new trial; Pollock, B., and Field, Manisty, and Fry, JJ., thinking that there should not. It is not necessary to choose between the divers reasons which led them to the same result on the first point. It may be necessary to do so on this minor point, where their reasons led to different results. I have come to the conclusion that there should not be a new trial. I will state the reasoning which has led me to these conclusions.

[1] L. R. 4 C. P. D. 175.

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My lords, I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbour's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbour; nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there was an actual assent, but that is, in many if not in all cases, a fiction; there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been laches or not; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are, '*ad ea quae frequentius accidunt iura adaptantur.*' This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive.

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It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes* v. *Keme*, A.D. 1613[1], proves the great antiquity of this law. But, as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case*[2]. I will read the whole of it, for though the point actually decided was only that a window first erected in the reign of Queen Mary, that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of

[1] Yelv. 215. [2] 1 Leon. 168; Michaelmas, 29 & 30 Eliz. A.D. 1587.

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the Court on points not actually decided is important. 'Bowry brought an action upon the case against Pope, and declared that in the time of Edward VI, the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The which Mason leased one of the said houses to one *A.*, and covenanted by the indenture of lease with the said *A.*, that it should be lawful for the said *A.*, his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen Mary a window was made accordingly where no window was there before. And afterwards *A.* assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building *super solum ipius Pope ex opposito* the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty, and it was found for the plaintiff. And it was moved for the defendant in arrest of judgement that here upon the declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected *scilicet* in the time of Queen Mary. The stopping of which by any act upon my own land was held lawful and justifiable by the whole Court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole Court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted as above said, then Pope could not have justified the nuisance, which was granted by the whole Court.'

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on Littledale, J., in *Moore* v. *Rawson*[1], and which leads Fry, J., in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither Mason nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In Trinity, 29 Eliz., about nine months later, the Queen's Bench, in *Bland* v. *Moseley*, decided the second point resolved by the

[1] 3 B. & C. 332.

Common Pleas the same way, and they also seem to have agreed with the third resolution. The case is cited in *Aldred's Case*[1]. The reasons, as reported by Lord Coke, are: 'It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and Wray, C. J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et vescitur aura aetherea*, and the said words *horrida tenebritate* are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos quae prospicit agros.* But the law does not give an action for such things of delight.'

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbour's lights by hoardings, until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General* v. *Doughty*[2], where he observes that if that was the case there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird*[3]

[1] 9 Co. Rep. 58 b. [2] 2 Ves. Sen. 453.
[3] 10 C. B. (N. S.) 268; 13 C. B. (N. S.) 841.

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and *Chasemore* v. *Richards*[1] are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction the law has always, since *Bland* v. *Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. *Pigott*, decided in 1625, is reported in Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; and W. Jones, 145. It seems to have excited a good deal of attention, and many things seem collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury* v. *Pigott* was, that in a conveyance there was (though nothing was said) an implied grant that neither the conveyor nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water; a principle which, in the case of a house, would certainly include support.

In *Palmer* v. *Fleshees*[2] the first point ruled by Twysden and Wyndham, JJ., was, 'If I, being seised of land, lease forty feet to *A.* to erect a house upon it, and other forty feet to *B.* to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury* v. *Pigott's Case*[3], for each can make the best advantage of his own, but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging.' The reference to *Shury* v. *Pigott*[3] shows that in this place 'ancient' means 'existing before the conveyance of the land.' The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in 1 Levinz, 122: 'It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder' (vendor) 'can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by Twysden and Windham, JJ.,

[1] 7 H. L. C. 349.
[2] 1 Sid. 167.
[3] Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145.

Hyde being absent and Kelynge doubting. For the lights are a necessary and essential part of the house. And Kelynge said, "Suppose the land had been sold first and the house after, the vendee of the land might stop the lights." Twysden, to the contrary, said, "Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns." But all agreed that a stranger having lands adjoining to a messuage newly erected may stop the lights, for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription.' I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the Digest, lib. xli, tit. 3, art. 1, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by showing that it was not originally given to him. And I think that the decisions ending in *Backhouse* v. *Bonomi*[1], which is put in a very clear light by Manisty, J., in his opinion, decide that he should not be deprived of it. Fry, J., thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

[1] 9 H. L. C. 503.

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But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Backhouse* v. *Bonomi*[1] the workings which did the mischief were at a considerable distance from the plaintiff's house, and would not have done any harm if the intervening minerals had not been previously removed by the defendant. Very different considerations may arise where the intervening minerals have been removed by the plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention the *Corporation of Birmingham* v. *Allen*[2], as Lush, J., did below, to show that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon* v. *Vintners' Company*[3], where it was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house; and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by Lush, J.[4], one very little onerous to the neighbours, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Praetor that possession must not be *vi vel clam*, as

[1] 9 H. L. C. 503.
[2] L. R. 6 Ch. D. 284.
[3] 4 H. & N. 585.
[4] L. R. 3 Q. B. D. 89.

1881.

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I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favour of quieting title; where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned Judge could, at the trial, on this evidence have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighbouring soil. The judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper storey, and I cannot see what else could have been asked.

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The second defence is a question of pure law. Ever since *Quarman* v. *Burnett*[1] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne Railway Co.*[2]; *Pickard* v. *Smith*[3]; *Tarry* v. *Ashton*[4].

I do not think either side disputed these principles, nor that, in *Bower* v. *Peate*[5], the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler* v. *Hunter*[6] was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that the defendants are right in saying that it was such as to make the case not distinguishable from *Bower* v. *Peate*[5], I think that the reasoning in *Bower* v. *Peate*[5] is the more satisfactory of the two.

My lords, the Court of Appeal in this case ordered that unless the defendants elected within fourteen days to take a new trial, judgement should be entered for the plaintiffs. If your lordships take the view of the case which I have stated, and which is that of Lush, J., Pollock, B., Field, Manisty, and Fry, JJ., it will be sufficient to dismiss the appeal, for the time for the election to take a new trial is long passed, and it need not be noticed.

LORD SELBORNE, L. C., and LORDS PENZANCE and WATSON concurred, and *the appeal was dismissed.*

[1] 6 M. & W. 499.
[2] 6 H. & N. 488.
[3] 10 C. B. (N. S.) 473.
[4] L. R. 1 Q. B. D. 314.
[5] L. R. 1 Q. B. D. 321.
[6] 7 H. & N. 826.

1886. The Darley Main Colliery Company *v.* Mitchell, L. R. 11 A. C. 127.

A right of support to land is infringed as soon as, and not until, damage is sustained in consequence of the withdrawal of that support. Therefore, whenever a fresh subsidence occurs, although proceeding from the original act or omission, a new cause of action accrues in respect of the damage done thereby, and the period of limitation begins to run afresh.

1886.

The Darley Main Colliery Company v. Mitchell.

Appeal from a decision of the Court of Appeal [1].

The respondent having brought an action against the appellants for damages for injuries done to his cottages by subsidence in the ground on which they stood, caused by the improper working of the defendants' colliery, among other defences they set up the Statute of Limitations. At the trial before Hawkins, J., at the Leeds Summer Assizes, 1883, the following facts were proved or admitted:—

The plaintiff was the freeholder of six perches of land and three cottages thereon, in the parish of Darfield, Yorkshire. The defendants were lessees of a seam of coal under the plaintiff's land, and worked the coal up to 1868. In consequence of that working a subsidence of the land took place in 1868 causing injury to the plaintiff's cottages, in respect of which the defendants were required to and did then execute repairs. The defendants never worked the coal after 1868, but in 1882 a further subsidence of the land took place, causing further injury to the cottages. For this injury this action was brought in December 1882.

The special jury having been discharged by consent, Hawkins, J., on further consideration entered judgement for the defendants upon the defence of the Statute of Limitations, the plaintiff's counsel admitting that he could not distinguish the case from *Lamb* v. *Walker* [2]. The Court of Appeal (Brett, M.R., Bowen and Fry, L. JJ.) reversed this decision and entered judgement for the plaintiff for damages to be assessed by an arbitrator [3]. From this decision the defendants appealed.

During the argument of the respondent's counsel before the House a discussion took place as to the cause of the subsidence in

[1] L. R. 14 Q. B. D. 125. [2] L. R. 3 Q. B. D. 389.
[3] L. R. 14 Q. B. D. 125.

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1882, and in the result the following statement was agreed to in writing between the appellants' and respondent's counsel:—That after the partial subsidence in 1868 the strata remained practically quiescent until the working of the coal in the next adjoining land in 1881, which working caused a 'creep' and a further subsidence. That if the owner of the adjoining land (one Cooper) had not worked his coal there would have been no further subsidence; but the appellants admit that if the coal under the respondent's land had not been taken out or if the appellants had left sufficient support under the respondent's land, then the working of the adjoining owner would have done no harm.

Feb. 8, 1886. LORD HALSBURY.—My Lords, in this case the plaintiff, the owner of land upon the surface, has sued the lessee of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property by causing it to subside. The defendants before and up to the year 1868 have worked, that is to say, excavated, the seams of coal, of which they were lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability and made satisfaction. There were other subsidences after this, and as the case originally came before your lordships, it was matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence. The parties have now by an admission at your lordships' bar, placed the matter beyond doubt.

It has been agreed that the owner of the adjoining land worked out his coal subsequently to 1868. That if he had not done so there would have been no further subsidence, and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm. Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only

manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

But the words 'cause of action' are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a Court of Law in this case is the damage to his land, and by *the* damage I mean the damage which had in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover *toties quoties* fresh damage is inflicted.

Since the decision of this House in *Bonomi* v. *Backhouse* [1] it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation.

In *Rowbotham* v. *Wilson* [2], Cresswell, J., said that the owner of the mines might have removed every atom of the minerals without being liable to an action, if the soil above had not fallen; and what is true of the first subsidence seems to me to be necessarily true of every subsequent subsidence. The defendant has originally created a state of things which renders him responsible if damage accrues; if by the hypothesis the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog which bites his neighbour; can it be contended that when the bitten man brings his action he must assess damages for all possibility of future bites? A man stores water artificially, as in *Fletcher* v. *Rylands* [3]; the water escapes and sweeps away the plaintiff's house; he rebuilds it, and the artificial reservoir continues to leak and sweeps it away again. Cannot the

[1] 9 H. L. C. 503.

[2] 8 E. & B. 123, 157.

[3] L. R. 3 H. L. 330.

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plaintiff recover for the second house, or must he have assessed in his first damages the possibility of any future invasion of water flowing from the same reservoir?

With respect to the authorities the case of *Nicklin* v. *Williams*[1] was urged by the Attorney-General as an authority upon the question now before your lordships, by reason of some words attributed to Lord Westbury in *Bonomi* v. *Backhouse*[2]. If Lord Westbury really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. Parke, B., in that case delivered the judgement against the plaintiffs recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in *Bonomi* v. *Backhouse*[2], since if that had been law there could have been no answer to the plea of the Statute of Limitations in that case. It is difficult to follow the Master of the Rolls when he says it was not necessary to overrule *Nicklin* v. *Williams*[1] by that decision. It seems to me to have been the whole point decided in *Nicklin* v. *Williams*[1], and how that case so decided can be an authority for anything I am at a loss to understand.

I think the decision of this case must depend as matter of logic upon the decision of your lordships' House in *Bonomi* v. *Backhouse*[2], and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but if such considerations were permissible, I think Cockburn, C. J., in his judgement in *Lamb* v. *Walker*[3] establishes the balance of convenience to be on the side of the law, as established by *Bonomi* v. *Backhouse*[2]. I cannot logically distinguish between a first and a second, or a third, or more subsidences, and after *Bonomi* v. *Backhouse*[2] it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell, J., has said, and I think rightly, that he might remove every atom of the mineral.

The wrong consists, and, as it appears to me, wholly consists, in

[1] 10 Ex. 259. [2] 9 H. L. C. 503, 512.
[3] L. R. 3 Q. B. D. 389.

causing another man damage, and I think he may recover for that damage as and when it occurs.

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For these reasons, I think that the judgement appealed from should be affirmed with costs.

LORD BRAMWELL.—My Lords, laying down general propositions is attended with the same danger as giving definitions. Some necessary qualification or exception is generally omitted. Moreover, such propositions are often and justly called *obiter*. With these dangers before my eyes, I shall nevertheless venture on some abstract propositions.

It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of the one blow. I may apply the test I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee. That for damage to his person would remain in him. I have put the case of a trespass. The same would be true of an action for consequential damages. A man slandered or libelled by words actionable in themselves must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for the actionable slander, another for the personal loss—certainly if the case in Siderfin is right[1]. But it is not necessary to decide this.

I now come to the case of where the wrong is not actionable in itself, is only an *iniuria*, but causes a *damnum*. In such a case it would seem that as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act. For example, *A.* says to *B.* that *C.* is a swindler, *B.* refuses to enter

[1] *Saunders* v. *Edwards*, 1 Sid. 95.

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into a contract with *C.*, *C.* has a cause of action against *A.*; *D.*, who was present and heard it, also refuses to make such a contract; surely another action would lie. And so one would think if *B.* subsequently refuses another contract. Of course, one can see that frauds might be practised. So they may in any state of law. But I cannot see why the second action would not be maintainable if the second loss was traced to the speaking. And perhaps one might apply the same test. Would not the first right of action pass to the trustees of *C.* if he became bankrupt? If the second loss was after the bankrupt's discharge, it would not.

There is still another class of cases to be considered, viz. those where the act causing damage is not in itself wrongful. No easier case can be taken than the above ground case of an excavation, whereby an adjoining owner's soil is let down. It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury was imminent and certain. What would be the rights of the person damaged in such a case? I think the former reasoning would apply. If there was an excavation 100 yards long, and 50 feet of the neighbouring soil fell in, the right of action would be in respect of those 50 feet, and not only in respect of what had fallen in, but what would in future fall in along the 50 feet. But if afterwards the other 50 feet fell in there would be a fresh cause of action. Surely this must be so. If 10 feet at one end fell in and afterwards 10 feet at the other, it would be impossible to say that there would not be two causes of action. If the excavation was on two sides of a square, the same consequences. The Attorney-General denied this, and was driven to do so. But suppose *A.* owned the adjoining property on one side, and *B.* that which was at right angles to it, there must then be two causes of action.

Now apply this reasoning to the present case. There are by the admission of the parties two separate and distinct damages caused to the plaintiff by the acts, including in that word omissions, of the defendants. One a removal of coal and non-providing of supports, which caused a subsidence in 1868. A cause of action accrued then. Another cause of action is the removal of coal, including perhaps the coal which caused the first subsidence, but doubtless also a removal of coal extending to a greater distance, and not immediately under the plaintiff's land, and the non-providing

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against the consequences; which, when the adjoining owner to the defendants removed his coal, as he lawfully might (though I think that immaterial), caused a creep in the defendants' land, which in time caused the further subsidence. I think this gives a second cause of action. I think, therefore, the judgement was right.

It seems to me not to matter that the subsidence was of the same spot, nor that the immediate cause of the second subsidence was the non-existence of coal underneath that spot. Two damages have been occasioned to the plaintiff, one directly and immediately by the removal of the coal under his surface: the other by that and removal of other coal, and consequent creeping and further subsidence. The Attorney-General, as I have said, denied that there could be two causes of action if two different parts of the plaintiff's land subsided at two different times. But surely there must be. Suppose the two pieces belonged to different owners, as I have suggested.

Of course one can see the danger and inconvenience that will follow. This damage accrues many years after the defendants' act or omission which has caused it. If my reasoning is right, many years hence there might be a further action from some further subsidence. But the inconvenience is as great the other way. For if the defendants are right, it follows that on the least subsidence happening, a cause of action accrues once and for all, the Statute of Limitations begins to run, and the person injured must bring his action, and claim and recover for all damage, actual, possible, or contingent for all time.

As to the authorities, *Bonomi* v. *Backhouse*[1] seems clearly in the plaintiff's favour. Indeed I have thought of limiting my judgement to the following remark on it. It decided that the excavation of the coal was not wrongful, and that the cause of action accrued when the damage arose. The damage now complained of arose at the last subsidence. That subsidence was no part of or continuance of the former subsidence, nor caused by the same cause only, but by a further cause, in this sense, that without this cause the subsidence would not have taken place. Therefore no cause of action in respect of it arose till it happened.

LORD FITZGERALD concurred, LORD BLACKBURN dissented, and *the appeal was dismissed.*

[1] 9 H. L. C. 503.

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NOTE.—Where a tort of a continuous nature has been committed affecting the land of another, the continuing of the trespass or nuisance from day to day is considered in law a several trespass on each day: 2 Wms. *Saund.* p. 171, note F, citing *Monkton* v. *Pashley*, 2 Ld. Raymond, 976. Consequently, if the injured party parts with his interest in the property to another, such other can sue and recover damages for the continuing tort as from the day his title accrued. For continuing nuisance: see per Parke, B., in *Thompson* v. *Gibson*, 7 M. & W. at p. 767; for continuing trespass: see *Hudson* v. *Nicholson*, 5 M. & W. 437, and *Holmes* v. *Wilson*, 10 A. & E. 503. In *Dawson* v. *Great Northern and City Railway Company* (1904), 1 K.B. 277, Wright, J., affirmed this principle and held that any claim in the nature of damages for a wrong was not a legal chose in action and not assignable under s. 25 (6) of the Judicature Act, 1873, and could not be sued for by an assignee in his own name, though a successor in title to land could sue in his own right for the injury (if any) done to his own interest therein.—[ED.]

1851. EMBREY AND ANOTHER *v.* OWEN, 6 EX. 353; S. C. 20 L. J. (EX.) 212.

A riparian proprietor has, as an incident to his property in the land through which it passes, a right to the uninterrupted flow of the stream, and to the reasonable user thereof for the purposes of his occupation, subject to the like rights on the part of the other riparian proprietors.

An infringement of this right will give rise to a cause of action without proof of actual damage.

The same law prevails with respect to the analogous natural rights to light and air.

1851.

EMBREY AND ANOTHER v. OWEN.

This was an action on the case by the plaintiffs as occupiers of a water grist mill against the defendant, as owner of land on one side of the stream above the mill, for diverting part of the water for the purpose of irrigating the meadows in the occupation of the defendant's tenant.

At the trial, before Talfourd J., at the last Summer Assizes for Montgomeryshire, it appeared that the plaintiffs were occupiers of a water grist mill situate on the banks of the river 'Rhiew,' a mountain stream, in the parish of Berriew, in that county. The defendant Mrs. Owen was the owner of land on both sides of that river above the mill; and this action was brought against her for diverting part of the water of the river, for the purpose of irrigating certain meadows on the northern bank, which were in the occupation of her tenant John Jones. The water was diverted by

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means of an iron trough or aqueduct placed near a waste weir, from whence the surplus or waste water was carried into the trough or aqueduct, and by it over the river into the main and floating gutters of the meadows, when required for irrigation; at other times such surplus water was discharged from the trough or aqueduct direct into the bed of the river by means of an iron flap or sluice in the middle side of the trough, so constructed as to be opened for the latter purpose at pleasure. A portion of the water was lost by absorption and evaporation in the process of irrigation; the working of the plaintiffs' mill, however, was not in the least impeded; and the quantity thus lost was differently calculated by scientific witnesses on both sides, a witness for the plaintiffs estimating it at four or five per cent., and a witness for the defendant at only one-seventh per cent., even in summer. All the witnesses concurred that there was no *sensible* diminution of the stream by reason of the diversion, that is to say, none cognizable by the senses, and that the amount of loss was ascertainable only by inference from scientific experiments on the absorption and evaporation of water poured out on the soil.

The learned judge left to the jury the following questions—(1) whether there was any sensible diminution of the natural flow of the water by reason of the diversion, and (2) whether the quantities of water absorbed and evaporated thereby were small and inappreciable? The jury answered the first question in the negative and the second in the affirmative. Upon these findings the judge directed that the verdict should be entered for the defendant, reserving leave for the plaintiff to move to enter it for them with nominal damages. A rule *nisi* was obtained accordingly, and now came on for argument.

The judgement of the Court (PARKE, ALDERSON, PLATT, and MARTIN, BB.) was delivered by

PARKE, B.—The important question is that which arises on the plea of not guilty, the jury having found that no sensible diminution of the natural flow of the stream to the plaintiffs' mill was caused by the abstraction of the water. That the working of the mill was not in the least impeded was clear on the evidence. On that finding we think the verdict was properly ordered to be entered for the defendant.

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It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a *right* to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury *to a right*, and, if continued, would be the foundation of a claim of adverse right in that proprietor.

We by no means dispute the truth of this proposition, with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *iniuria sine damno* is actionable, as was laid down in the case of *Ashby* v. *White*[1] by Lord Holt, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgement of the late Mr. Justice Story in *Webb* v. *The Portland Manufacturing Company*[2]. But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them.

The law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright* v. *Howard*[3], followed by *Mason* v. *Hill*[4], and ending with that of *Wood* v. *Waud*[5], and is fully settled in the American courts[6].

The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici iuris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only[7]. But each proprietor of the adjacent

[1] 2 Ld. Raym. 938.
[2] 3 Sumn. Rep. 189.
[3] 1 Sim. & S. 190.
[4] 3 B. & Ad. 304; 5 id. 1.
[5] 3 Exch. 748.
[6] 3 Kent's *Comm.*, Lect. 52, pp. 439–445.
[7] 5 B. & Ad. 24.

land has the right to the usufruct of the stream which flows through it.

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This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

It is only therefore for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use it will; even, as the case above cited from the American Reports shows, though there may be no *actual* damage to the plaintiff. In the part of Kent's *Commentaries* to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length:—'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams

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of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: "Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat."'

In America, as may be inferred from this extract, and as is stated in the judgement of the Court of Exchequer in *Wood* v. *Waud*[1], a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it 'en bon père de famille, et pour son plus grand avantage': Code Civil, art. 640, note a, by Pailliet[2]. He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above-cited case of *Wood* v. *Waud*[1], it was observed, that in

[1] 3 Exch. 748. [2] See his *Manuel de Droit Français*. Paris, 1838.

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England it is not clear that an user to that extent would be permitted; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiffs' right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream.

We are therefore of opinion that there has been no injury in fact or law in this case, and consequently that the verdict for the defendant ought not to be disturbed.

The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing

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the natural purity of the air; he cannot erect a building, or plant a tree, near the house of another, without in some degree diminishing the quantity of light he enjoys: but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.

Rule discharged.

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A landowner has the right to appropriate water percolating in no defined channel through the strata beneath his land; and no action will lie against him for so doing, even if he thereby intercepts, abstracts or diverts water which would otherwise pass to or remain under the land of another.

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This was a proceeding in Error on a judgement in the Court of Exchequer Chamber. The plaintiff was a mill-owner near Croydon; the defendant, the clerk of the Local Board of Health of that town, in which character he was sued.

The declaration stated, that the plaintiff was possessed of an ancient mill, with the appurtenances, and was entitled to the flow of a certain stream, called the Wandle, for the purpose of working, using, and more conveniently enjoying the said mill, and that the said board wrongfully abstracted and prevented the flow of and diverted the water of the said stream away from the said mill, and wrongfully abstracted and prevented and intercepted the flow of and diverted water which ought to have flowed into the said stream and mill, and continued to abstract, prevent, divert, and intercept the same respectively, by digging and sinking a well near to the said stream, and taking the water of such well.

The defendant pleaded not guilty, by statute. The statute stated in the margin was 11 & 12 Vict. c. 63, s. 139, a public Act. Upon this plea issue was joined.

The cause came on for trial at the Kingston Assizes in March 1854, before Alderson, B., when a verdict was entered for the plaintiff, subject to the award of Mr. Creasy, with power to him to state a special case for the opinion of the Court. A case was stated, and the following are the material facts set forth in it:—

The plaintiff is occupier of an ancient mill on the River Wandle,

and as such entitled to use and enjoy the flow of the said river for the purpose of using and working the said mill. The said river above the plaintiff's mill has always been fed (amongst other sources of supply) by the rainfall of a large district, including Croydon. This water sinks into the upper ground, and thence percolates through the strata to the river, but in no definite course or channel. The Local Board, for the purpose of supplying Croydon with water, sunk a well upon their own land, about a quarter of a mile from the river, and erected pumps, by means of which they abstracted large quantities of water. Part of this water was then finding its way underground towards the river, and, if not intercepted by the operation of the said well and pumping, would have found its way into the river above the plaintiff's mill, in quantity sufficient to have been of sensible value towards the working of the mill. The Local Board was actuated by no malice, and did not intend to diminish the quantity of water in the river, or to injure any person interested in the use thereof.

The question for the opinion and judgement of the Court is whether, under these circumstances, the said Local Board of Health is legally liable in this action to the plaintiff for the abstraction of water as above described.

On May 14, 1856, the Court of Exchequer, acting upon the authority of *Broadbent* v. *Ramsbotham* [1], and without hearing any argument, gave judgement for the defendant.

On May 12, 1857, the Court of Exchequer Chamber affirmed that judgement, Coleridge, J., differing from the other judges [2]. On this judgement error was suggested.

The judges were summoned, and Wightman and Williams, JJ., Martin, B., Crompton, J., Bramwell and Watson, BB., attended.

THE LORD CHANCELLOR (LORD CHELMSFORD) proposed for the opinion of the judges the following question—'Whether, under the circumstances stated in the printed case, the Croydon Local Board of Health is legally liable to the action of the appellant for the abstraction of the water in the manner described?'

The judges unanimously answered the question in the negative.

July 27. LORD CHELMSFORD.—My Lords, the question in this

[1] 11 Exch. 602. [2] 2 Hurl. & Nor. 168.

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case is, whether the plaintiff in Error is entitled to claim against the defendant the right to have the benefit of the rainwater which falls upon a district of many thousand acres in extent, and percolates through the strata to the River Wandle, increasing the supply of water in the river, and being of sensible value in and towards the working of an ancient mill belonging to the plaintiff. The acts of the defendant by which this underground water was interrupted and prevented from finding its way into the river were done upon his own land.

It was conceded by the plaintiff in argument, that a landowner had a limited and qualified right to appropriate water, the course of which is invisible and undefined, exactly to the same extent and for the same purposes as he would be entitled to use water flowing in a defined and visible channel. This, it was contended, must be confined to a reasonable use of the water for domestic and agricultural purposes, and perhaps (it was said) according to the opinion of Chancellor Kent, for the purposes of manufacture also. It must further be admitted (and appeared to be so in argument), that in addition to these direct uses to which the water may be diverted, if in the regular course of mining operations the percolation of underground water is arrested in its progress, and prevented reaching a point where it would have increased a supply which had previously been usefully employed by an adjoining landowner, he can maintain no action for the loss of the water thus cut off from him. A distinction was suggested between such a use as the one last mentioned, where the interception of the water was merely the consequence of operations upon a party's own land, and the present, where the very end and object of the act done was to collect and appropriate the water. And upon the state of things existing in this case, a further distinction was insisted upon between a party sinking a well in his own land for domestic, or agricultural, or manufacturing purposes, and a public board or a water company doing the same thing for sanitary purposes, or for supplying the inhabitants of the neighbourhood with water.

Before, however, the plaintiff can question the act of the defendant, or discuss with him the reasonableness of the claim to appropriate this underground water for these purposes (whatever they may be), he must first establish his own right to have it pass

freely to his mill, subject only to the qualified and restricted use of it, to which each owner may be entitled through whose land it may make its way. It seems to me that both principle and authority are opposed to such a right.

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The law as to water flowing in a certain and definite channel has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Lord Chief Baron Pollock, in *Dickinson* v. *The Grand Junction Canal Company*[1], 'that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above-ground.' But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water-supply extend?

[1] 7 Exch. 300, 301.

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In this case, the water which ultimately finds its way to the River Wandle is strained through the soil of several thousand acres. Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants? For, with Coleridge, J., I do not see here 'how the ignorance' which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, 'is material in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in the case of a servitude, but out of the nature of the thing itself'[1].

This distinction between water flowing in a definite channel, and water whether above or underground not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities and in uncertain directions, depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument. In *Rawstron* v. *Taylor*[2], it was held that, in the case of common surface-water rising out of springy or boggy ground, and flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of plaintiff's mill. And in *Broadbent* v. *Ramsbotham*[3] it was decided that a landowner has a right to appropriate surface-water which flows over his land in no definite channel, although the water is thereby prevented from reaching a brook, the stream of which had for more than fifty years worked the plaintiff's mill. Alderson, B., in delivering the judgement of the Court in that case, says[4], 'No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel.'

[1] 2 Hurl. & Nor. 191.
[2] 11 Exch. 369, 382.
[3] 11 Exch. 602.
[4] Ibid. 615.

These cases apply to the right to surface-water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description. This appears clearly to have been the opinion of Tindal, C. J., and the Court of Exchequer Chamber, in the case of *Acton* v. *Blundell*[1]; for, although the Court abstained from intimating any opinion as to what might have been the rule of law if there had been an uninterrupted user for twenty years of the well of the plaintiff, which had been laid dry by the mining operations of the defendant, yet the chief justice having prefaced his judgement by stating that 'the question argued had been in substance this, whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface,' he concludes with these words[2]: 'We think that the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure, and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque iniuria*, which cannot become the ground of an action.

The Court of Exchequer, in the present case, gave judgement for the defendants without argument, on the authority of the decision in *Broadbent* v. *Ramsbotham*[3]. The Court of Exchequer Chamber affirmed that judgement, there having been only one dissentient opinion, which, however, pronounced as it was by a most learned and able judge (Coleridge, J.), is certainly entitled to the highest respect. The judges, of whose assistance your lordships have had the advantage, have been unanimous in their agreement with the judgement of the Court of Exchequer Chamber.

[1] 12 M. & W. 324, 348. [2] 12 M. & W. 353. [3] 11 Exch. 602.

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Against this concurrence of authority, what is there to be opposed in favour of the plaintiff but the *nisi prius* case of *Balston* v. *Bensted*[1], and the case of *Dickinson* v. *The Grand Junction Canal Company*[2]? With respect to *Balston* v. *Bensted*[1], it does not appear that the question of the right to water percolating through the strata, as contradistinguished from water flowing in a visible stream, was ever presented to Lord Ellenborough's mind, as it is stated, that the defence was intended to be set up, but that he observed, early in the trial, that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it. Whether, by the words, 'in any particular manner,' his lordship meant to point to the right claimed in that case, or intended to state a proposition applicable to all water of which there had been a twenty years' enjoyment, from whatever source it might be derived, it is impossible to gather from the report; but the question was never argued; and as, upon proof that the decrease of the water in the plaintiff's bath had been occasioned by the operations in the defendant's quarry, the case was at once referred, it can hardly be urged as any authority at all upon a point of such importance, and which requires so much consideration as that which it is supposed to have decided.

With respect to the case of *Dickinson* v. *The Grand Junction Canal Company*[2], upon which the plaintiff also relied, after the observations made upon it by Cresswell, J., in the Exchequer Chamber, and by Wightman, J., in delivering the opinion of the judges to this House, it is unnecessary for me to say more than that I entirely agree with them, and think that it can hardly be regarded as a satisfactory decision upon the point now under consideration. It appears to me that reason and principle, as well as authority, are opposed to the claim of the plaintiff to maintain an action for the interception of the underground water which would otherwise have ultimately found its way to the River Wandle, and that, therefore, the judgement of the Court of Exchequer Chamber ought to be affirmed.

LORD WENSLEYDALE.—My Lords, this case is of the greatest importance, and requires the most full and attentive consideration.

[1] 1 Camp. 463. [2] 7 Exch. 282.

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No question that has occurred in my time has been so worthy of the most careful examination; and though we have had a very able argument at the bar from the learned counsel, and we also have been favoured with the able and unanimous opinion of six of the judges, pronounced by Wightman, J., I must own, speaking for myself, I should still desire further discussion, as I have felt very great difficulty in coming to a conclusion satisfactory to my mind; so many difficulties present themselves on both sides.

As, however, my noble and learned friends who heard the case argued at the bar have not had the same difficulty in deciding that I have, and acquiesce in the propriety of the case being now disposed of, I concur, though not without very serious doubts as to the propriety of the conclusion at which they have arrived.

Besides the opinion of the learned judges, delivered by Wightman, J., Bramwell, B., has had the goodness to communicate to me one which he wrote, at the time when I suppose a difference of opinion was expected, and I am much indebted to him, as the subject is discussed by him with much ability.

Your lordships have, for the first time, to decide the question as to the rights to underground water. There are two conflicting authorities; the case under appeal, and that of *Dickinson* v. *The Grand Junction Canal Company*[1], and your lordships have to decide between them. It is supposed in the judgement in this case, delivered in the Exchequer Chamber, by Cresswell, J., that the Court of Exchequer had, in two subsequent cases, *Rawstron* v. *Taylor*[2], and *Broadbent* v. *Ramsbotham*[3], decided differently. Those cases are said to be inconsistent with the decision in *Dickinson* v. *The Grand Junction Canal Company*[1], and virtually to overrule it. This is certainly a mistake, for having been a party to the judgements in each of those cases, I am sure I at least had no notion of impugning the doctrine which I had joined in laying down before, in the case of *Dickinson* v. *The Grand Junction Canal Company*[1], which was not decided without great consideration. In *Broadbent* v. *Ramsbotham*[3], it did not appear that any water which percolated the strata would have reached the brook; and I well recollect that, on the argument, I so considered, and therefore that the plaintiff could not recover on the ground on which the case of *Dickinson* v. *The Grand Junction Canal*

[1] 7 Exch. 282. [2] 11 Exch. 369.
[3] 11 Exch. 602; 25 L. J. (Ex.) 115.

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Company[1] was decided. The argument of Mr. Cowling, as reported in the 25 Law Journal, 122, Exchequer, which is fuller than that in the 11 Exchequer, was directed to this point. I may add, that the report is more correct than that in the 11 Exchequer, which attributes to me too limited a view of the decision in *Dickinson* v. *The Grand Junction Canal Company*[1].

The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgements placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex iure naturae*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour.

The elaborate judgement of Lord Denman in the case of *Mason* v. *Hill*[2], in 1833, reviewed most prior judgements and authorities of importance up to that date, and fully established that proposition. But former authorities, and of a very early date, when carefully considered, really left no room for doubt on this subject.

The case of *Shury* v. *Pigott*, decided in 1625[3], Whitlock, J., laid it down that 'a watercourse differs from a way or common; that it doth not begin by prescription nor yet by assent, but the same doth begin *ex iure naturae*, having taken this course naturally, and cannot be averted,' and he observed that the course of a spring is a natural course and current, and to stop this may be a nuisance to the commonwealth, and a private wrong. And in *Brown* v. *Best*[4], Lee, C. J., is reported to have said that a watercourse is *ex iure naturae*, and therefore a declaration stating merely the possession of the place through which the water used to run is good. And Denison, J., said that in natural watercourses that was the most proper mode of declaring.

[1] 7 Exch. 282.
[2] 5 B. & Ad. 1.
[3] 3 Bulstr. 339; Poph. 166; Palm. 444.
[4] 1 Wils. 174.

This decision in the case of *Mason* v. *Hill*[1] has been followed by many others laying down the same proposition, of which *Wood* v. *Waud*[2] was one. *Mason* v. *Hill*[1] had been preceded by the case of *Wright* v. *Howard* before Vice-Chancellor Sir John Leach[3]. And it was followed by *Embrey* v. *Owen*[4], and by *Dickinson* v. *The Grand Junction Canal Company*[5].

This position is also established in the American courts, *Tyler* v. *Wilkinson*[6], and sanctioned by the best writers of the highest authority: Kent's *Commentaries*[7]. And it is laid down as the first proposition in the very able treatise on watercourses by Mr. Angel, an American authority (pp. 1, 21, 22). And it has been held in America that the law implied damage from the violation of the right, *vide* Angel on water (p. 98), *Pastorius* v. *Fisher*[8]; a matter which has been sometimes doubted, though probably without sufficient reason.

We may consider, therefore, that this proposition is indisputable, that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, or presumed grant. And the expressions used by Bayley, J., in *Williams* v. *Morland*[9], and by Tindal, C. J., in *Liggins* v. *Inge*[10], that water flowing in a stream is *publici iuris*, and the property of the first occupier, are founded on a mistake between the property in the water itself and the right to have its continual flow.

The observations, also, of Tindal, C. J., in the case of *Acton* v. *Blundell*[11], and of Maule, J., in *Smith* v. *Kenrick*[12], as to the origin of the right to the continual flow of a superficial stream, being the presumed acquiescence of the proprietors above and below, and which is the foundation of the distinction made by the Lord Chief Justice between those streams and subterranean watercourses, cannot be supported.

Now the right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a

[1] 5 B. & Ad. 1.
[2] 3 Exch. 748.
[3] 1 Si. & Stu. 190.
[4] 6 Exch. 353.
[5] 7 Exch. 282.
[6] Mason, U. S. Repts. 400.
[7] Vol. iii, Lect. 52, pp. 439–55.
[8] 1 Rawle, Pennsylvania Reports, 27.
[9] 2 B. & C. 910.
[10] 7 Bing. 682.
[11] 12 M. & W. 324.
[12] 7 C. B. 515.

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right *ex natura*, and an incident to the land itself, as a beneficial adjunct to it, as was determined in the case of *Wood* v. *Waud*[1].

If the River Wandle in this case had been supplied by natural streams flowing into the river above ground, or in known definite channels below ground, the cutting off those streams to which the person entitled to the use of the river was entitled *ex natura* as feeders of the river would be an injury to him, and give a right of action. And if this be true with regard to underground streams finding their way into the river, then comes the difficulty how to distinguish the smaller rivulets, and the drops of water which flow and percolate into and supply the river. They are all equally the gifts of nature for the benefit of the proprietors of the soil through and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil, any more than the property in the water of a river which flows through it on the surface.

In *Acton* v. *Blundell*[2] it is said by Tindal, C. J., that the case 'rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that he finds to his own purposes, at his free will and pleasure.' If this applies to water underground in a natural course of transit (and it must do so to be applicable at all), and not to mere stagnant water, I agree with Coleridge, J., in his remark, that the reason why it is, as such, more the subject of property than the water flowing above ground, is not explained[3]. Surely the use of the flowing water in each case, and not the property in it, belongs to the proprietor of the surface.

As to that part of Mr. Justice Coleridge's opinion in which he relies on the possession of the mill for thirty or sixty years[4], I think he is wrong. I do not think that the principle on which prescription rests can be applied; it has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards: 'qui non prohibit quod prohibere potest, assentire videtur.' But how here could he prevent it? He could not bring an action against the adjoining proprietor;

[1] 3 Exch. 748.
[2] 12 M & W. 324.
[3] 2 H. & N. 192.
[4] Ibid. 191, 193.

he could not be bound to dig a deep trench in his own land to cut off the supplies of water, in order to indicate his dissent. It is going very far to say, that a man must be at the expense of putting up a screen to window-lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the plaintiff. For the same reason, I dispute the correctness of Lord Ellenborough's opinion in the case of the spring in *Balston* v. *Bensted*[1], where there had been twenty years' enjoyment of it in a particular mode. The true foundation of the right is, that it is incident to the land *ex iure naturae*.

What, then, is the distinction between superficial streams and subterranean water? With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterraneous waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbour's land of moisture, and even tap a copious spring, and prevent it from flowing to his neighbour's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbour, especially as the precise course and direction of such water can seldom be known accurately beforehand.

In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land.

In the civil law are to be found many instances in which it is allowed to cut off subterraneous supplies, if it is done in the culti-

[1] 1 Camp. 463.

1859.

CHASEMORE v. RICHARDS. — Lord Wensleydale.

vation of the soil. In the Digest[1] it is said, 'Denique Marcellus scribit; Cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi; nec de dolo. Et sanè actionem non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.' And a very extensive sense is given to these words, authorizing the improvement of the proprietor's own land, in the civil law. In the same book of the Digest[2], 'De aqua et aquae pluviae arcendae,' it is said that the making a work, 'agri colendi causa et frugum querendarum causa,' and thereby altering the course of the 'aquae pluviae,' is not actionable. The term 'fruges' is said to be the same as rent, 'Frugem, pro reditu appellari, non solum quod frumentis aut leguminibus; verùm et quod ex vino, sylvis caeduis, cretifodinis, lapidicinis, capitur.' It would seem, therefore, that if the sources of a fountain or spring in an adjoining piece of land were cut off by excavating, in order to get the minerals in any place, it would be deemed by the Roman law to fall within the principle of the improvement of the land, and not be actionable.

The case of *Acton* v. *Blundell*[3] would be rightly decided upon this ground, because the injury to the plaintiff's well was caused by the lawful exercise of the defendant's right to get the minerals in his land; and unless he had that right, the public would have lost the benefit of a valuable gift of Providence.

We come then to the conclusion, that every man has a right to the natural advantages of his soil—the plaintiff to the benefit of the flow of water in the river and its natural supplies, the defendant to the enjoyment of his land, and to the underground waters on it, and he may, in order to obtain that water, sink a well. But according to the rule of reason and law, 'sic utere tuo ut alienum non laedas,' it seems right to hold, that he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be. The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, 'animo vicino nocendi.' The same principle is adopted in the laws of Scotland, where an otherwise lawful act is forbidden 'if done "in aemulationem vicini,"' but this principle has not found a place in our law[4].

[1] Bk. 39, tit. 3, art. 1, s. iii; in Pothier's edition, iii. 578.
[2] Bk. 39, tit. 3, art. 1, s. ix.
[3] 12 M. & W. 324.
[4] Lord Wensleydale seems to have been mistaken in his view of the law

The question in this case, therefore, as it seems to me, resolves itself into an inquiry, whether the defendant exercised his right of enjoying the subterraneous waters in a reasonable manner. Had he made the well and used the steam-engines for the supply of water for the use of his own property, and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaint. But I doubt very greatly the legality of the defendant's acts in abstracting water for the use of a large district in the neighbourhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighbouring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the defendant could have dug a well himself on his own land, and taken the like quantity of water, so that the defendant may have taken much more than would have been abstracted if each had exercised his own right.

The same objection would not apply to the abstraction of water for the use of the dwellers on the defendant's land, even though they carried on trades requiring more water (breweries, for example) than would be used for mere domestic purposes; it would still be for their purposes only. But in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the defendant's land.

On the whole, I should certainly have wished to give this important case further consideration; but, as my noble and learned friends have formed their opinions upon it, I acquiesce, and do not give my advice to your lordships to reverse the judgement.

LORDS CRANWORTH, KINGSDOWN and BROUGHAM concurred in the judgement of LORD CHELMSFORD.

Judgement of the Court of Exchequer Chamber affirmed.

of Scotland in this respect. See the *Mayor of Bradford* v. *Pickles* (1895), A. C. at p. 598, where Lord Watson, speaking of the Scotch law as well as of the English, says: 'No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper, or even malicious.'—[ED.]

1904. Colls *v.* Home and Colonial Stores, Limited, L. R. (1904) A. C. 179[1].

An action for the obstruction of ancient lights is analogous to an action on the case for a nuisance. To succeed in such an action it is not sufficient to prove merely that the light is less than before. It must be established that the diminution of light is such as really makes the dominant tenement to a sensible degree less fit for the ordinary purposes of business or occupation.

Whether a dominant owner can be heard to prove a special prescriptive right to an extraordinary amount of light *quaere* (per Lord Davey).

The nature of the right to light has not been altered by the Prescription Act (2 & 3 Wm. IV, c. 71).

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In this action the plaintiffs (the respondents in the appeal) claimed an injunction to restrain the defendant (the appellant) from erecting on the site of 44 Worship Street, E. C., any building or erection so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs, as the same were enjoyed previously to the taking down of 44 Worship Street.

The following statement of facts and findings is taken[2] from the judgement of Joyce, J. (reported in 17 T. L. R. 180):—'The plaintiffs are entitled for the residue of a term, having about seventeen years unexpired, to a considerable block of buildings situated on the east side of Paul Street at the corner between that street and Worship Street, which runs westwards from Paul Street, so that the plaintiffs' building has a west front to Paul Street and a south front of about 150 feet in length to Worship Street. Worship Street is a tolerably broad thoroughfare, being 41 feet or thereabouts across. Opposite a portion of the south front of the plaintiffs' premises in Worship Street is the site of some buildings recently removed, which is about 36 feet in width and numbered 44 in the street. The buildings which formerly stood on this site were 19 feet 6 inches in height, and the defendant has entered into a building agreement to erect on this site a building which, if and when completed, would be 42 feet in height. On the west of the defendant's premises and at the corner between the south side of Worship Street and the east side of Wilson Street there is a public-

[1] The judgement in this case was delivered while this book was passing through the press. The report is taken from some advance proofs of the Law Reports kindly furnished to the editors by Mr. J. M. Moorsom, K.C.

[2] By kind permission of the proprietors of the *Times*.

house 33 feet in height, and none of the buildings in Worship Street on the east of the defendant's premises exceed that height. It is, I think, tolerably clear, and I find as a fact, that defendant's building, if erected to the height of 42 feet as proposed, would not materially interfere with the access of light to any window on the first floor of the plaintiffs' premises, or with any light to which the plaintiffs are entitled with respect to their basement.

The real and only question in my opinion is with respect to apprehended injury to the third and fourth windows, counting from Paul Street on the ground floor of the plaintiffs' building. These windows are of large size, but although the top light is said to be the most valuable and important, the uppermost part of each of the windows is filled with coloured glass to a depth of 20 inches from the top, and there are wire blinds fixed to the bottom of each window. The portion of the ground floor of the plaintiffs' building which is opposite the defendant's premises is used as an office. It consists of a large room 11 feet 10 inches high and of unusual depth—the back wall being upwards of 50 feet from the Worship Street front; and it has no window or source of natural light at the back. This room contains several desks used by clerks in the employment of the plaintiffs for the purposes of their business. It is fitted with electric light; there being five rows of lamps in or near to the ceiling and arranged parallel to Worship Street. It is, I think, the result of the evidence that it has ordinarily, if not always, been the custom to use the electric light in the back part of the room, and it would require a most extraordinary amount of light from the windows in Worship Street to enable such use of the electric light to be dispensed with, even on ordinary days.

Practically, I think, it may be assumed that the use of the electric or some other artificial light is now, and must always be, necessary in order to illuminate the back part of the room even in the daytime. There is no evidence to show that any such extraordinary amount of light from the Worship Street windows has been enjoyed or required for anything like the period of twenty years. Probably the ground floor rooms in the plaintiffs' premises were reconstructed or rearranged as they now are within quite a recent period. Various expert witnesses were examined and, as the result of their evidence, I am of opinion that the proposed new building

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of the defendant would not affect the selling or letting value of the plaintiffs' premises.

If erected to the proposed height of 42 feet, no part of the defendant's building would be high enough to touch any line drawn at an angle of 45 degrees to the horizon from any point in the base or sill of either of the windows in question belonging to the plaintiffs. But the defendant's building would, for its width of 36 feet directly south of these windows, cut off a portion of the sky area now visible from within the plaintiffs' office; and it would, I think, to some extent, necessitate more frequently and, during somewhat longer hours than at present, the use of artificial light in the front part of the office. It is practically admitted that the defendant's building might be raised a certain height—the plaintiffs' principal witness said to a total height of 25 feet from the ground—without any material injury to the plaintiffs. Apart from any question with respect to the back part of the plaintiffs' premises and to the extraordinary amount of light required (if it could possibly be obtained therefor in the absence of illumination by artificial light), the plaintiffs' premises would still, in my opinion, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. If they were of only ordinary depth they would have amply sufficient light—at present they have abundance of light, and, in fact are, in my opinion, unusually well lighted.'

Joyce, J., dismissed the action with costs. The decision was reversed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L. JJ.), who granted an injunction to restrain the appellant from building so as to darken, injure, or obstruct any of the respondents' ancient lights or windows as they were enjoyed previously to the taking down of the old building at 44 Worship Street, with an order to pull down all the building which had been so built as to darken, &c.[1] Between the decision of Joyce, J., and the decision of the Court of Appeal the appellant had put up his proposed building.

This appeal was twice argued—first, on May 15, 18, 19, 21, before the Earl of Halsbury, L. C., and Lords Shand, Davey, and Robertson; and, secondly, on December 8, 10, 11, 1893, before

[1] (1902) 1 Ch. 302.

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the same noble and learned lords, with the addition of Lords Macnaghten and Lindley. Lord Shand died before judgement was delivered.

LORD MACNAGHTEN.—My Lords, the right of a person who is owner or occupier of a building with windows in it, privileged as ancient lights, in regard to the protection of the light coming to those windows, is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement. This right in early times was vindicated by an action on the case for nuisance—*Baten's Case*[1]—in which damages might be recovered and judgement had for removal or abatement of the nuisance. In *Aldred's Case*[2] Lord Coke says that an action lies for nuisance done to light as one of the three essential requisites of habitation. 'An action lies,' he says, 'for hindrance of the light, for the ancient form of the action was significant, sc.—*quod messuagium horridâ tenebritate obscuratum fuit.*' It was not every diminution of light that would support such an action. The form of the action itself shows that. In later times, when an action for the protection of ancient lights came to be regarded rather as an action for disturbance of an easement than an action grounded on nuisance—as an action to prevent the infringement of a right rather than an action to redress a wrong—the necessity of showing the gravity of the injury complained of was not so obviously apparent. Still the principle was the same, and it must always be the same. 'It is not sufficient,' as Lord Hardwicke observed in *Fishmongers' Co.* v. *East India Co.*[3] 'to say it will alter the plaintiffs' lights. . . . The law says it must be so near as to be a nuisance.'

Probably the most satisfactory statement of the rule to be applied in all cases of ancient lights is to be found in *Back* v. *Stacey*[4] and *Parker* v. *Smith*[5]. *Back* v. *Stacey*[4] was an issue directed by the Lord Chancellor to try two questions: (1) whether the ancient lights of the plaintiff in his dwelling-house in Norwich had been

[1] 9 Rep. 54 a.
[2] 9 Rep. 57 b.
[3] 1 Dick. 163.
[4] 2 C. & P. 465.
[5] 5 C. & P. 438.

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'illegally' obstructed by a building of the defendant, and (2) if so, what damage the plaintiff had sustained in respect of the injury. So that if the jury had found that the obstruction complained of was an illegal obstruction the damages would have gone to the whole of the injury, and not merely to the loss sustained up to the date of the writ. It was contended there that, as it was evident that the quantity of light previously enjoyed had been diminished, the plaintiff was at any rate entitled to a verdict on the first issue, any obstruction of ancient lights being illegal. But according to the report, 'Best, C. J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. His lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises.'

Back v. *Stacey*[1] was determined in 1826. *Parker* v. *Smith*[2] was heard during the sittings after Michaelmas Term, 1832. It is, I think, the earliest reported case dealing with the question of light after the passing of the Prescription Act, which came into operation on the first day of Michaelmas Term, 1832. It was tried before Tindal, C. J. The marginal note states accurately, I think, the effect of the decision in these words: 'That diminution of light and air which the law recognizes as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation.' It does not seem to have been suggested either by the counsel or the judge that the Prescription Act had made the slightest alteration in the nature of the right to light or the

[1] 2 C. & P. 465. [2] 5 C. & P. 438.

principle on which the question of an alleged infringement of that right ought to be determined.

To these two cases I would only add the case of *Wells* v. *Ody*[1] before Parke, B., in 1836. In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal, C. J., in *Parker* v. *Smith*[2]. And then, after reading a passage from *Parker* v. *Smith*[2], he concluded his address to the jury by saying: 'The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation.' So much for the right at law.

Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions. Under Lord Cairns's Act (21 & 22 Vict. c. 27) the Court was empowered, in all cases in which it had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to the party injured, either in addition to or in substitution for such injunction. The Act commonly known as Sir John Rolt's Act (25 & 26 Vict. c. 42) provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent upon a legal right, every question of law or fact cognizable in a Court of common law on the determination of which the title to such relief or remedy depended should be determined by or before the same Court. These Acts are superseded by the Judicature Act, and now the High Court has all the jurisdiction of the Court of Chancery and of the several Courts of law. But still, so far as the right in question is a legal right, the Court in the exercise of its jurisdiction must be guided by the principles established at law. And those principles, in my opinion, are still to be found most clearly and most concisely exhibited in the cases before Best, C. J., and Tindal, C. J., to which I have already referred.

Although the question thus stated appears tolerably simple, it

[1] 7 C. & P. 41. [2] 5 C. & P. 438.

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cannot be disputed that the reported cases on questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which has come to the windows during a period of twenty years. This view is conspicuous in *Calcraft* v. *Thompson*[1], before Lord Chelmsford, L. C., and in *Scott* v. *Pape*[2], where Cotton, L. J., speaks of a 'cone of light' and Bowen, L. J., of 'a specific quantity of light' as a measure of the plaintiff's right. The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes.

I think this divergence of view comes from a difference of opinion, consciously or unconsciously entertained, as to the meaning and effect of the provisions of the Prescription Act (2 & 3 Will. IV, c. 71), and, if I am not mistaken, it may be traced to certain expressions, not perhaps sufficiently guarded, which are to be found in judgements delivered in this House in the case of *Tapling* v. *Jones*[3]. In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt s. 3 says so in terms, but s. 4 must be read in connexion with s. 3; and if the two sections are read together, it will be seen that the period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question, no absolute or indefeasible right can arise under the Act. There is what had been described as an inchoate right. The owner of the dominant tenement after twenty years' uninterrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, and the origin of his right is just the same as if the Act had never been passed. No title is as yet acquired under the Act. This

[1] 15 W. R. 387. [2] L. R. 31 Ch. D. 571.
[3] 11 H. L. C. 290.

point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright* v. *Williams*[1], and including *Richards* v. *Fry*[2] and *Cooper* v. *Hubbuck*[3], in which there is an interesting controversy between Willes, J., and Williams, L. J., on the question whether the twenty years' uninterrupted enjoyment under the third section is the period of twenty years before any suit or action, or twenty years before each suit or action in which the point may from time to time arise. The former construction, in which Erle, C. J., and Byles, J., concurred with Willes, J., eventually prevailed.

The question is of little or no practical importance. But the construction established by the series of decisions to which I have referred, in accordance with the express language of the statute, goes, I think, a long way to show that the view taken by James, L. J., Mellish, L. J., and Lord Selborne as to the effect of the Act is absolutely correct, and that the qualification suggested by Bowen, L. J., in *Scott* v. *Pape*[4] is not well founded. It certainly would be strange if the Court had been compelled to hold that the Prescription Act confers on a person whose right is questionable at least to this extent, that it has been actually brought into question, a higher and a larger right than that possessed by a person whose prescriptive claim to the enjoyment of light is so clear as to be beyond all question. The Act neither enlarges the right of the dominant tenement nor adds to the burthen of the servient tenement. Its effect is simply this: When the access and use of the light have been enjoyed for the full period which before the Act was supposed to be sufficient to support a prescriptive claim and the right is then brought into question, it avoids and extinguishes every adverse plea not founded upon an agreement or consent in writing.

Now, if this be so, it seems to me, in accordance with the opinion expressed by James, L. J., and Brett, L. J., in *Ecclesiastical Commissioners* v. *Kino*[5], and by many other judges, that the direction given by Best, C. J., in *Back* v. *Stacey*[6] is the direction which a Court exercising the functions of both judge and jury ought to keep steadily in view.

[1] 1 M. & W. 77.
[2] 7 Ad. & E. 698.
[3] 12 C. B. (N. S.) 456.
[4] L. R. 31 Ch. D. 571.
[5] L. R. 14 Ch. D. 213.
[6] 2 C. & P. 465.

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Lord Davey.

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I think the appeal ought to be allowed with costs here and below.

LORD DAVEY.—My Lords, the question for your lordships to determine is . . . What is the true nature and extent in English law of the easement of light? It must be regretfully admitted that the numerous decisions on this subject in the Courts are not easily reconcilable, and are not infrequently contradictory. No judgement of this House has been referred to, except that in the case of *Tapling* v. *Jones*[1], the decision in which does not directly affect the point now before your lordships. I do not propose to travel through the long catena of authorities. They were copiously referred to at the bar, and the principal cases are stated and carefully analysed in the judgement of Wright, J., in *Warren* v. *Brown*[2].

My lords, you will find that in the earlier authorities the obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance. In *Aldred's Case*[3] the 'hindrance of light' is treated in the same category as the nuisance of fouling the air by pigstyes. In *Fishmongers' Co.* v. *East India Co.*[4] Lord Hardwicke said: 'As to the question whether the plaintiffs' messuage is an ancient building so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion that it is not a nuisance contrary to law, for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the City, and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but there is no reason to hinder a man from building on his own ground.'

Consistent with this view is the direction of Best, C. J., to the jury in the oft-quoted case of *Back* v. *Stacey*[5]. The learned judge said: 'It was not sufficient to constitute an alleged obstruction that the plaintiff had, in fact, less light than before, nor that his

[1] 11 H. L. C. 290.
[2] [1900] 2 Q. B. 722.
[3] 9 Rep. 57 b.
[4] 1 Dick. 153.
[5] 2 C. & P. 465.

warehouse, the part of his firm principally affected, could not be used for all purposes to which it might otherwise be applied. In order to give a right of action there must be a substantial privation of light sufficient to render the occupation uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.' In *Clarke* v. *Clark*[1] Lord Cranworth stated the question thus: 'Whether the obstruction is such as to deprive the party of such a supply of light as he might reasonably calculate on enjoying.' After saying that the plaintiff's rooms were rendered less cheerful, he adds: 'But I cannot think that this is such an obstruction of light as to amount to a nuisance. . . . What the plaintiff is bound to show is that the buildings cause such an obstruction of light as to interfere with the ordinary occupations of life.' In *Robson* v. *Whittingham*[2], decided in the following year, Knight Bruce and Turner, L. JJ., expressed themselves as entirely satisfied with Lord Cranworth's judgement, and Turner, L.J., accentuated his approval by saying that he thought this class of cases had been carried too far before the decision in *Clarke* v. *Clark*[1] was pronounced. Nothing that I can say will add to the respect and authority which the opinions of those two learned and experienced judges must command with your lordships.

It has been thought that the third section of the Prescription Act (2 & 3 Will. IV, c. 71) altered substantially the previously existing law as to ancient lights, and had the effect of conferring on the owner of the dominant tenement, by twenty years' enjoyment, an absolute and indefeasible right to the full amount of the light enjoyed during that period. And it must be admitted that the language of the section lends some plausibility to that opinion. It is, however, not consistent with the language of Lord Cranworth in *Clarke* v. *Clark*[1], and the point was expressly determined by James and Mellish, L. JJ., in *Kelk* v. *Pearson*[3], decided by them in the year 1871.

James, L. J., there says: 'I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows

[1] L. R. 1 Ch. 16. [2] L. R. 1 Ch. 442.
[3] L. R. 6 Ch. 8 9.

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of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, or for the beneficial use and occupation of the house if it were a warehouse, shop, or other place of business. That was the extent of the easement, a right to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and convenient.' The statute, in fact, has only altered the conditions or length of user by which the right may be acquired, but not the nature of the right.

In the case of the *City of London Brewery Co.* v. *Tennant*[1] Lord Selborne expressed his complete adherence to the view of the law taken in the case of *Kelk* v. *Pearson*[2], correcting some impressions which might have arisen from the language used in some former cases by some learned judges. . . .

My lords, I regard the decisions in *Kelk* v. *Pearson*[2] and the *City of London Brewery Co.* v. *Tennant*[1] as complementary to, and on the same lines with, Lord Cranworth's judgement in *Clarke* v. *Clark*[3]. And so regarding it, I entirely approve of it. . . .

In *Lanfranchi* v. *Mackenzie*[4] Malins, V.-C., held that a person could not, by using the dominant tenement for a period less than twenty years for some special purpose requiring an extraordinary amount of light in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for twenty years. 'No man,' said the Vice-Chancellor, quoting the words of another judge, 'can by any act of his own suddenly impose a new restriction on his neighbour.' In their judgement in *Warren* v. *Brown*[5] the Court of Appeal dissented from this decision, and their opinion was a logical conclusion from the views which they expressed as to the nature and extent of the easement. My lords, I do not concur with the opinion of the Court of Appeal, for I think that the case of *Lanfranchi* v. *Mackenzie*[4] was rightly decided. I agree with the

[1] L. R. 9 Ch. 212. [2] L. R. 6 Ch. 809.
[3] L. R. 1 Ch. 16. [4] L. R. 4 Eq. 421.
[5] [1902] 1 K. B. 15, at p. 24.

Vice-Chancellor that it would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their substantial identity, it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alteration which may be made in the internal structure of it. I do not propose to discuss at length the question how far a variation in a tenement will destroy an easement appurtenant to it. The law on that subject is as old as *Luttrel's Case*[1].

In the case of *Martin* v. *Goble*[2] a malthouse had been converted into a workhouse, and it was held that the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. That case has been the subject of much criticism, and I think that some judges have thought that the language of the Lord Chief Baron had a wider scope than it was intended to have. Following the suggestion of Wood, V.-C., it may be supported on the ground that (to use the language of *Luttrel's Case*[1]) the alteration affected the substance and not only the quality of the tenement.

But while agreeing that a person does not lose his easement by any change in the internal structure of his building or the use to which it is put, and that regard may be had, not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it is quite another question whether he is entitled to be protected at the expense of his neighbour in the enjoyment of the light for some special or extraordinary purpose. It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. If that measure be by common law or by the statute the whole amount of light which has had access to his windows, *cadit quaestio*. But if this view of the law be not accepted, you must introduce that 'supposed standard' which Romer, L. J., repudiates. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be

[1] 4 Rep. 86 a. [2] 1 Camp. 320.

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asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard? It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour. If the action be brought a month before the change it would be dismissed. If it be brought a month afterwards an injunction would be granted. I am of opinion that the Courts have gone too far in this question of lights, and have imposed undue restrictions on persons in the exercise of their lawful right to build on their own land.

In the second argument before your lordships the leading counsel for the respondents contended that his clients had for more than twenty years enjoyed the access of light over the appellant's land to their ground-floor office in its present condition. I believe that all your lordships are agreed with Joyce, J., that there is no proof to support such a contention. The fact relied on was not put in issue at the trial, and the evidence was not directed to it. If the plaintiffs had intended to claim and rely on a special easement of that description, it was for them to state their claim and prove the facts to support it. It is unnecessary to say, therefore, whether such a claim would be good in law. Malins, V.-C., thought it could be sustained if the special user was had with the knowledge of the owner of the previous tenement. I will only say that I see some difficulties in the way, and reserve my opinion.

My lords, I must apologize for the length at which I have trespassed on your attention. According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question.

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The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance. I do not myself think that this rule is difficult of application in practice. In the majority of cases no such questions as those which have been raised in *Warren* v. *Brown*[1] and the present case occur. The experience of surveyors who are practically conversant with this matter is entitled to great respect. As Mr. Vigers states in his evidence, they have adopted a working rule for the purpose of advising those who consult them and settling differences by negotiation. The rule of 45 degrees is not, of course, a rule of law, and is not applicable to every case. But I agree with Lord Selborne (*City of London Brewery Co.* v. *Tennant*[2]) that it may properly be used as primâ facie evidence.

For these reasons I think that the appeal should be allowed, and the decree of Joyce, J., restored with costs here and below.

LORD ROBERTSON concurred in the judgement of LORD DAVEY. LORDS HALSBURY and LINDLEY delivered judgements to the same effect. The order of the Court of Appeal was reversed, and judgement of JOYCE, J., restored with costs here and below.

1894. LEMMON *v.* WEBB, L. R. (1894) 3 Ch. 1 (C. A.).
(Affirmed in the House of Lords, 1895, A. C. 1.)

The encroachment of the boughs or roots of trees upon the land of an adjoining owner is not a trespass or occupation of the soil, but a nuisance, which may be abated without notice by the adjoining owner, if he can do so without entry.

A person injured by a nuisance upon the land of another may enter and abate the nuisance without notice, if the person in possession himself created it, or in cases of emergency. In other cases, notice to the person in possession, requesting him to abate the nuisance, and non-compliance therewith are necessary to justify the entry and abatement of the nuisance by the person aggrieved.

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LINDLEY, L. J.—The plaintiff and the defendant in this case are adjoining landowners. Some old trees situate on the plaintiff's land had branches which projected over the defendant's land. The defendant cut off so much of these branches as projected over

[1] [1900] 2 Q. B. 722. [2] L. R. 9 Ch. 212, at p. 220.

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his land, and he did so without going on to the plaintiff's land, and without previous notice to him. The question is whether the defendant was justified in so doing. Mr. Justice Kekewich thought not, and gave the plaintiff judgement for £5 and costs, and from this judgement the defendant has appealed.

There is some controversy as to whether the defendant did not cut rather more than he himself says he did, and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land; and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment, for the action was not brought for such a trumpery purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the defendant had no right to cut the branches at all, or, at all events, no right to cut them without previous notice to the plaintiff and a request to him to cut them, and a non-compliance by the plaintiff with that request.

It was contended on behalf of the plaintiff that, having regard to the age of the trees and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled, and that either under the *Statute of Limitations* or by prescription the plaintiff had a right to keep the branches when they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and, if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action of trespass would lie in such a case, and it is plain that Lord Ellenborough did not think it would: see *Pickering* v. *Rudd*[1]. According to our law the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in Gale on *Easements*[2], to which

[1] 4 Camp. 219.

[2] Sixth edition, p. 461.

reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty; but it is quite inconsistent with the authorities to which I will refer presently, and no court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it.

The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the law for centuries: see Brooke's *Abr.* '*Nusans*'[1]; *Norris* v. *Baker*[2]; *Pickering* v. *Rudd*[3]; *Crowhurst* v. *Burial Board of Amersham*[4]—and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Kekewich, J., intimate any doubt upon the law up to this point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with; and the real question is whether notice is required by law. The authorities to which I have referred do not allude to the necessity of notice. In *Pickering* v. *Rudd*[3], which was an action for cutting the plaintiff's Virginian creeper, the plea contained no averment of notice, and the plaintiff did not demur, but new assigned and alleged an excessive cutting. Lord Ellenborough held that the only question was whether the defendant had exceeded his right by cutting too much. Again, in Chitty on *Pleading*[5], a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the seventh edition, iii. 364, such an averment is introduced, and reference is made to *Jones* v. *Williams*[6]. *Jones* v. *Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it

[1] Vol. ii. 105, pl. 28.
[2] 1 Roll. 393.
[3] 4 Camp. 219; 1 Stark. 56.
[4] L. R. 4 Ex. D. 5.
[5] Seventh edition, vol. iii. 364.
[6] 11 M. & W. 176.

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was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance and non-compliance with that request are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided, and so far the decision only applies to what one man may do on another man's land; it does not show what a man may or may not do on his own land. But in *Jones* v. *Williams*[1], Baron Parke, who delivered the judgement of the Court, referred to a case in *Jenkins*[2], and to *Penruddock's Case*[3], as authorities for the proposition that an owner of land cannot without notice remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained.

But, assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree. The judgement of Best, J., in *Earl of Lonsdale* v. *Nelson*[4] is explicit, that overhanging trees may be lopped by the owner of land over which they hang without notice. Best, J., says the right so to lop them is an exception to the general rule which requires notice before a nuisance, not created by the owner of what creates it, can be abated by a person injured by it. He is not alluding to a case of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards. His lordship says: 'Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred.'

[1] 11 M. & W. 176.
[2] Page 260, case 57.
[3] 5 Rep. 100 b.
[4] 2 B. & C. 311.

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What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots (see Gale on *Easements*[1], where the learned writer says: 'There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it. Supposing no easement to exist, there seems nothing to take this out of the ordinary rule, that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching, in the same manner that he may the overhanging branches.'

The law on the subject is, in my opinion, as follows: 'The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice, so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

The defendant contended that he was justified in cutting the plaintiff's trees because they were in imminent danger of falling; but this is not proved, and my judgement is not based on grounds of urgency.

The appeal, therefore, must be allowed, and the appellant must have the costs of the appeal. Judgement must be entered for the defendant; but, having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the defendant, there will be no order as to the costs of the action.

KAY, L. J.—This is an action for damages for cutting boughs off the plaintiff's trees. The trees are large oaks and elms of great

[1] Sixth edition, p. 461.

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age, and the boughs overhung the land of the defendant. They were cut off by the defendant without any previous notice to the plaintiff.

What is the legal position when trees growing on the land of *A.* extend their roots and boughs into and over the adjoining land of *B.*? It was argued that it was the same as if *A.* had built a house on the edge of his own land with cellars within the land of *B.*, and a projecting upper storey extending over *B.*'s land. But in that case *B.* might bring against *A.* an action of trespass or ejectment. Would trespass or ejectment lie against the owner of the tree?

In the case of the house there is an occupation by *A.* of *B.*'s land to the extent of the encroachment, and this by lapse of time may grow into a right, and in such a case by the ordinary rule an action will lie without any proof of damage. Is the extension by natural growth of the roots or boughs of a tree into and over the land of another an occupation of that land which can become a right by lapse of time?

Or is this encroachment simply a nuisance, and, if so, can it be abated by the owner of the land encroached on? If it can, must he before abating it give notice to the owner of the tree?

It is argued that when the boughs or roots can be cut without entering upon the land of the owner of the tree notice should not be necessary. The owner of the land encroached upon has a right to use his own land either by digging in the soil or by building upon it, and if there be roots or boughs in the way he should be allowed to remove them without notice to any one.

On the other hand, it is said notice is necessary in all cases before a nuisance can be removed, except when the occupier of the adjoining land has himself caused the nuisance, or except when an emergency happens and there is danger to life or health or property and no time to give notice. It may be that roots and boughs may be cut without entering upon the adjoining land on which the tree stands; but the roots and boughs belong to the owner of the tree, and to cut them is to interfere with his property. It is reasonable and more likely to promote good feeling between neighbours that notice should be given before cutting, in order, as was said in *Earl of Lonsdale* v. *Nelson*[1], that the

[1] 2 B. & C. 302.

owner may have an opportunity of removing the encroachment himself.

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It is necessary to examine carefully the authorities on these questions. In Brooke's *Abr.* 'Nusans'[1], it is stated, per Keble, that a man is not bound to lop a tree which encumbers a roadway 'chimin,' and, therefore, it should seem that another (that is, I suppose, some one not the owner of the tree) may do it. But nothing is said there about notice. Keble was not a judge. This, therefore, is a statement by counsel accepted by the reporter as law. In Hale *de Portibus Maris*[2]: 'Any man may justify the removal of a common nusance either at land or by water, because every man is concerned in it'; and he instances a case of the burgesses of Southampton justifying the throwing down of a weir in a creek of the sea which hindered the navigation; 'but,' he continues, 'because this many times occasions tumults and disorders, the best way to reform public nusances is by the ordinary courts of justice.'

In 20 Vin. *Abr.*, under the head 'Trees' and 'Disputes between Neighbours,' I find: 'If trees grow in the hedge, and the fruit falls into another's ground, the owner may go in and take it. If the boughs of your trees grow out into my land, I may cut them: per Croke, J.[3] A tree grows in *A.*'s close, and roots in *B.*'s, yet the body of the main part of the tree being in the soil of *A.* all the residue of the tree belongs to him also[4].' There is added in a note: 'But if it grows in a hedge which divides the land of *A.* and *B.*, and the roots take nourishment of both their lands, it was adjudged they are tenants in common of it[5].'

This shows that the roots, though in another man's land, belong to the owner of the tree, and it is only where the tree is on the boundary line, so that the trunk is partly in the land of each of the adjoining owners, that they become joint owners of the tree: see *Holder* v. *Coates*[6]. I have examined the authorities referred to in Viner. The *dictum* by Croke, J.[7], is this: *Si les rames de vestre arber excresce en mon terre, jeo poio eux succider, mes jeo ne poio*

[1] Vol. ii. 105, pl. 28.
[2] 1 Harg. Tracts, 87.
[3] 1 Roll. 394, pl. 15; Trin. Jac. B. R. S. P. per Croke, J.; 3 Bulst. 198.
[4] 2 Roll. 141; Hill. 17 Jac. B. R. *Masters* v. *Pollie.*
[5] 2 Roll. 255; Mich. 20 Jac. B. R. *Anon.*
[6] Mood. & M. 112.
[7] 1 Roll. 394.

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justéfier le succider de eux devant ils excresce en mon terre pur timor de l'excrescer.

In *Pickering* v. *Rudd*[1] nailing a board to a wall so that the board overhung the land of another was held not to be a trespass, Lord Ellenborough saying: 'I do not think it is a trespass to interfere with the column of air superincumbent on the close.' He intimates that firing a gun so that the shot would strike the soil of another would be a trespass; but he doubts whether firing across another's land where the soil was not touched, or the passage of a balloon over the land, would be trespass, and says that if any damage was occasioned by the board there would be an action on the case.

In order to place the board the defendant cut away a Virginian creeper which grew in the plaintiff's garden and spread over the side of the defendant's house. He managed to do this, the report states, by means of ropes and a scaffolding suspended over the plaintiff's garden without touching the surface of the plaintiff's premises. There was no statement in the pleadings or evidence, so far as appears, that notice had been previously given of the intention to cut. Under the direction of Lord Ellenborough, who said that it was admitted on the record that some damage had been done by the continuance of the tree, and that the question was whether in removing the mischief the defendant had done any damage to the tree which might have been avoided, there was a verdict for the defendant, and in the ensuing term the King's Bench refused to grant a new trial.

In *Fay* v. *Prentice*[2] it was clearly intimated that if a man were to erect any building overhanging the land of another, an action of trespass, in which it is not necessary to show damage, would lie; but where an action on the case is brought instead to recover damages for the nuisance thereby occasioned it is necessary to show damage to support the action.

In *Penruddock's Case*[3] the question was whether a writ of *quod permittat prosternere* would lie for the feoffee of a house to which a nuisance was being committed by the drip from an adjoining house which had been built before the feoffment to him and was in the possession of an assign of the person who built it, and

[1] 4 Camp. 219, 220. [2] 1 C. B. 828.
[3] 5 Rep. 100 b.

it was held that it would, because this was a continuing nuisance; and it seems to have been held that he might himself abate the nuisance.

In *Earl of Lonsdale* v. *Nelson*[1] Best, J., states the law thus: 'Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice.'

In that case the action was for trespass in entering the land of the plaintiff. It was attempted to justify it by pleading that the entry was for the purpose of repairing an ancient building necessary for the maintenance of a port partly within the plaintiff's land. It was held that before such entry notice should have been given in order that the plaintiff might have an opportunity to do the repairs himself rather than suffer the intrusion of strangers.

It is not quite clear from the language of Best, J., whether a man may lop the boughs of his neighbour's trees so far as they extend over his land without notice except in case of some emergency occasioning danger to life or property. The judgement contains several important propositions: (1) The overhanging of the boughs of a neighbour's tree is a nuisance occasioned by omission. (2) Where a nuisance is occasioned by an act of commission the person injured may abate the nuisance without notice to him who actually committed the nuisance while he is in possession. (3) So where the security of life or property is in

[1] 2 B. & C. 311.

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danger, and there is no time to give notice, the person injured may abate a nuisance occasioned by an omission. (4) In all other cases of nuisances by omission Mr. Justice Best's opinion seems to be that the individual injured must not himself abate the nuisance, but should appeal to a court of justice. (5) The abatement of a nuisance occasioned by the overhanging boughs of trees is stated to be the only other case in which the injured person may abate the nuisance himself. But it is not distinctly said that he may do so without notice except in a case of emergency where there is no time to give such notice.

Jones v. *Williams*[1] was an action of trespass for entering the plaintiff's dwelling-house. The defendant pleaded that the plaintiff injuriously and wrongfully permitted filth to accumulate on his premises, and that the defendant entered to abate this nuisance. After verdict for the defendant the plaintiff applied for judgement *non obstante veredicto*, and he obtained it, the plea being held bad because it did not state whether the plaintiff himself placed the filth on his premises, or whether it was placed by another and he omitted to remove it, nor did it state that the plaintiff was under any obligation to remove it, and it did not aver a previous notice to the plaintiff. The Court decided: (1) That if the plaintiff had placed the filth there himself the defendant might enter and remove it without notice. (2) So, possibly, if there was any obligation on the plaintiff to remove it by custom or otherwise, and he did not. (3) But if the filth was placed there by another, and the plaintiff succeeded to the possession of the *locus in quo* afterwards, notice would be necessary before the defendant could enter to remove it. The judgement of Baron Parke continues thus[2]: 'We do not rely on the decision in *Earl of Lonsdale* v. *Nelson*[3] as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz. a right to construct a work on the plaintiff's soil which no authority warranted; but Lord Wynford's *dictum* is in favour of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's Case*[4] shows that an assize of

[1] 11 M. & W. 176; 12 L. J. (Ex.) 249.
[2] 11 M. & W. 181.
[3] 2 B. & C. 302.
[4] 5 Rep. 100 b.

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quod permittat prosternere would not lie against the alienee of the party who levied it without notice. The judgement in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that Court agreed that the nuisance might be abated, without suit, in the hands of the feoffee—that is, as it should seem, with notice'; and for confirmation of this his lordship refers to Jenkins's *Sixth Century*, p. 260, where the case is so stated, and notice before abatement is said to be necessary. He concludes that a notice or request is necessary in the case of a continuance of a nuisance by an alienee of the property and that the plea was bad; and Lord Abinger added a further exception where there was such immediate danger to life or health as to render it unsafe to wait to give notice.

It is significant that in the report of Lord Wensleydale's judgement[1] he is stated to have read Lord Wynford's *dictum* as having excepted the case of cutting the boughs of overhanging trees as a nuisance which might be abated without notice. In the judgement in the authorized report this reading of Lord Wynford's *dictum* is omitted. It would appear that, on further considering the words, Lord Wensleydale was not satisfied that this was their true meaning.

The result of the authorities seems to be this:—The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so.

Whether he may do so without notice is not stated distinctly in any of the cases; but on the whole I think that this is the meaning. In the older cases it is said that the owner of the land encroached on may cut the boughs, and nothing is said about giving previous notice, and I think that the true reading of *Pickering* v. *Rudd*[2] is, that he may do so without notice if he can do it without trespassing upon the land in which the tree grows. I come very reluctantly to this conclusion. I think the legal question very doubtful. In my opinion it would be better if the law were, that before cutting a neighbour's trees notice

[1] 12 L. J. (Ex.) 249. [2] 4 Camp. 219; 1 Stark. 56.

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Kay, L. J.

should be given in order to afford to the owner of the trees an opportunity of removing the boughs which occasion a nuisance. Whether that is the law or not, no one but an ill-disposed person would do such an act without previous notice. There was no emergency in this case. The defendant has acted in an unneighbourly manner, and I cannot help thinking he intended to cause annoyance. I do not think he ought to have any costs of the action, and I am reluctant to give him costs of the appeal.

LOPES, L. J., delivered judgement to the same effect, and *the appeal was allowed.*

TORT AND CONTRACT.

1895. MEUX *v.* THE GREAT EASTERN RAILWAY COMPANY, L. R. (1895) 2 Q. B. 387 (C. A.).

When the same state of facts shows not only a breach of contract but also a breach of a common law duty, a party to the contract may sue at his election on the contract, or in tort for a breach of the common law duty; but a stranger to the contract can only sue in tort.

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APPEAL from the judgement of Mathew, J., at the trial without a jury.

The action was brought to recover the value of a servant's livery under the following circumstances. The plaintiff directed her servant to travel by the defendants' line from a station in the country to London. He went to the station with a portmanteau, in which was his livery, which belonged to the plaintiff. At the station he took his ticket, which he paid for with money supplied to him by the plaintiff. The portmanteau (as appeared by admissions made in the case) was handed into the custody of the defendants' servants, to be carried by them to town as passenger's luggage, and it was overturned in front of a train by one of the defendants' servants, and was damaged and became useless to the plaintiff.

The learned judge decided that the plaintiff could not recover in contract as the contract made by the defendants was a personal contract with the servant, and that she could not recover in tort because the goods were not lawfully on the premises of the defendants. Judgement was accordingly given for the defendants on the ground that the goods were delivered to the defendants not as being the property of the plaintiff but as the personal luggage of the servant.

The plaintiff appealed.

KAY, L. J.—In this case the plaintiff's servant was about to travel on the defendants' line, and he took to the station a port-

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manteau apparently belonging to himself, and containing livery which was the property of the plaintiff. The livery was damaged, and in respect of such damage this action is brought. It was damaged by an act described in the admissions in the following terms: 'The property was overturned in front of the train by one of the defendants' servants, and the same was destroyed and became useless to the plaintiff.' It is quite plain that there was an act, not of omission but of commission, which was negligent and improper, and which caused the destruction of these things.

The law as to such a state of things has been summed up in *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Company*[1]. That was an action for personal injuries to the plaintiff, and the general doctrine is stated thus by Lindley, L. J.[2]: 'It appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere non-feasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case.' A. L. Smith, L. J., expressed himself to the same effect[3] that 'It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not[4].' To apply that case to the present one—Were these goods lawfully on the premises of the defendants? They were in the portmanteau of the servant, and they were his livery which he was accustomed to wear. He was about to travel as a passenger, and the portmanteau was accepted as his personal luggage, which the company were engaged to carry for him,

[1] [1895] 1 Q. B. 134.
[2] [1895] 1 Q. B. 134, at p. 138.
[3] [1895] 1 Q. B. 134, at p. 140.
[4] In *Kelly* v. *The Metropolitan Railway Company* (1895), 1 Q. B. at pp. 946-7 (C. A.), A. L. Smith, L. J., explained that in the expression 'active negligence' the Court intended to include all such acts of omission or commission as would give rise to an action for negligence apart from contract.—[ED.]

receiving no payment except for the ticket which he took for himself. It seems to me impossible under these circumstances to say that the livery was not lawfully on the company's premises. I think the test is this. Supposing the company had known that the portmanteau contained the servant's livery, could they have said they would not carry it as personal luggage? It seems to me quite plain that they could not have said anything of the kind, and in that respect the case differs from that of luggage containing goods belonging to other people in which the person who is carrying them as his personal luggage has no kind of interest. The learned judge came to the conclusion that the goods were not lawfully on the company's premises; but on this matter, on which his decision as to this part of the case seems to have been founded, I cannot agree with his view. I am not going to give any opinion upon the question whether, if the goods had not belonged to the servant at all but to some one else, and were in his portmanteau, they would have been lawfully upon the premises of the company. It seems to me, I must confess, a strong proposition to say that, where the company make no inquiry as to what is in the portmanteau, but accept it as personal luggage, they should be able to turn round and say, 'The goods were not yours.' However, on that point I give no opinion at the present time, because there seems to be some authority in a sense opposite to the view which I have indicated. In this case it seems to me quite impossible to say that the goods were not properly treated by the servant as being his personal luggage and were not lawfully on the defendants' premises. If they were lawfully there and were injured by an act of misfeasance, the authorities seem quite clear that the owner of the goods has a right to sue for damages for the injury caused by the tortious act of the servants of the company.

A. L. SMITH, L. J.—I also am of opinion that this judgement cannot be supported. The facts lie in the smallest compass. The plaintiff's footman was sent to London by his mistress, who gave him the money for his fare. He took in a portmanteau his livery, which was the property of the plaintiff. It was received as passenger's luggage, which in fact it was. It did not render it any the less the luggage of the footman because the property in the clothes still remained in the plaintiff. The livery was damaged by the active

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negligence of the company's servant, and the plaintiff seeks to recover in respect of this damage.

I am not going to decide as to what cause of action the footman might have, and what damages he could recover. The case of *Claridge* v. *South Staffordshire Tramway Company*[1], which bears on this point, may possibly require at some future time further consideration[2]. Of this I am clear, that in the circumstances of this case the footman who had taken the ticket could have sued the company either on contract or in tort, but what damages he could have recovered it is not necessary to discuss. The question before us is whether the plaintiff can sue. She has incurred loss by reason of her property having been destroyed by the active negligence of the servants of the company while it was lawfully on the premises of the company; she has therefore a right of action in tort wholly irrespective of contract. Her goods were lawfully on the defendants' premises, and by their active negligence those goods have been damaged. That gives her a good cause of action in tort. The only answer given is that *Alton* v. *Midland Railway Company*[3] has decided otherwise; but this is not so. I pointed out in *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Company*[4] that when the former case is looked into it appears that the sole point which was decided was on demurrer, which raised the question whether, the servant having contracted with the railway company to be safely and securely conveyed, the master could take advantage of that contract and sue for breach of it. That case is no authority for the proposition that the plaintiff cannot sue in tort irrespective of contract. There is plenty of authority on the other side: *Marshall* v. *York, Newcastle and Berwick Railway Company*[5], *Hayn* v. *Culliford*[6], *Foulkes* v. *Metropolitan District Railway Company*[7], *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Company*[4], and *Kelly* v. *Metropolitan Railway Company*[8], the bulk of the cases being in this court. It seems to me, therefore, that it is impossible to say on the facts of this case that the plaintiff has not a good cause of action against the company in tort. I agree, therefore, that the appeal should be allowed.

[1] [1892] 1 Q. B. 422.
[2] This case was overruled by '*The Winkfield*,' 1902, p. 42, and *supra*, p. 319.—[ED.]
[3] 19 C. B. (N. S.) 213; 34 L. J. (C. P.) 292.
[4] [1895] 1 Q. B. 134.
[5] 11 C. B. 655.
[6] L. R. 4 C. P. D. 182.
[7] L. R. 5 C. P. D. 157.
[8] [1895] 1 Q. B. 944.

LORD ESHER, M. R., delivered judgement to the same effect.

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Appeal allowed.

NOTE.—Compare per Littledale, J., in *Burnett* v. *Lynch* (1826), 5 B. & C. at p. 609, where he says: '*Assumpsit* lies where a party claims damages in consequence of a breach of a promise not under seal. That promise may either be express or it may be implied from a legal obligation to do a particular act. Where there is an express promise and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach.'

Under s. 116 of the County Courts Act, 1888, where an action is brought in the High Court which could have been commenced in the County Court, if the plaintiff recovers less than £20 in an action founded on *contract*, or less than £10 in an action founded on *tort*, he is entitled to no costs unless a special order is made. It has been decided, *for the purposes of this section only*, that unless a plaintiff is driven to rely upon a contract as the foundation of his case, the action will be deemed to be *founded on tort*: see *Turner* v. *Stallibrass* (1898), 1 Q. B. 56 (C. A.) and *Sachs* v. *Henderson* (1902), 1 K. B. 612 (C. A.). It is well to bear in mind the limited application of these cases.—[ED.]

1877. DICKSON *v.* REUTER'S TELEGRAM COMPANY, LIMITED, L. R. 3 C. P. D. 1 (C. A.).

Where a breach of contract incidentally causes damage to a stranger to the contract, he cannot recover in an action against the contracting party in default, unless fraud, negligence, or other breach of a legal duty on the part of such contracting party be proved *vis-à-vis* the person damaged.

Appeal from the judgement of the Common Pleas Division in favour of the defendants on demurrer to the statement of claim, which alleged that the plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson, & Co., of Liverpool; the defendants were a telegraph company, having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. The de-

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fendants had a system of forwarding in one 'packed' telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents and also to the senders, which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December, 1874, Dickson, Robinson, & Co. were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On December 26, 1874, the plaintiffs received at Valparaiso a telegraphic message, which they understood, and reasonably understood, to be a direction from Dickson, Robinson, & Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The misdelivery was caused by the negligence of the defendants or their agents. On receiving the telegram the plaintiffs proceeded to execute the supposed order and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs, by reason of the shipments, sustained a serious loss, and they now claimed that the defendants' company should reimburse them for that loss.

The facts are fully stated in L. R. 2 C. P. D. 62, where the proceedings in the Common Pleas Division are reported.

November 2, 3. Herschell, Q.C. (Benjamin, Q.C., and W. H. Butler with him), for the plaintiffs.—The question is, whether the statement of claim shows any cause of action. No doubt the case is novel, but if in the progress of mercantile dealing new cases arise, the Court will evolve the principle of law necessary to meet the exigencies of them, as was done in *Collen* v. *Wright*[1]. This action can be supported on two grounds: first, the defendants warranted to the plaintiffs that they had been employed to deliver this message to the plaintiffs, and the defendants are liable for a breach of warranty, in analogy to the case of *Collen* v. *Wright*[1], where the agent represented that he was acting for a principal; secondly, the defendants are carrying on the business of delivering telegraphic messages, and they are liable to any one dealing with them who is

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

injured through their negligence in carrying on that business. In *Playford* v. *United Kingdom Telegraph Company*[1] the action was brought for a mere error in the delivery of a message, and negligence was not alleged; in the present case negligence is charged, and on demurrer it is admitted that there was negligence.

The defendants warranted that the message was correct, or at least that their agents would take every precaution to avoid mistake. In *Collen* v. *Wright*[2] it was held that the plaintiff could sue an agent, because by purporting to act as agent he warranted that he was an agent; here the defendants, by delivering the message to the plaintiffs, warranted that they had authority to deliver the message. The general rule is that the representation must be false to the knowledge of the party making it in order to maintain an action on it. Upon this general rule an exception has been engrafted by *Collen* v. *Wright*[2], that a person representing himself to be an agent impliedly contracts that he has the authority of his alleged principal. The defendants, in effect, warranted that they had the authority of Dickson, Robinson, & Co. to deliver the message, and they warranted that the message was sent by them; it therefore falls within the principle of the exception, which has been established by *Collen* v. *Wright*[2].

On the other point, as to negligence, if a person carrying on a business acts negligently in conducting that business, he is liable to any person dealing with him who is injured by his negligent act. The defendants, in carrying on their business, negligently delivered a message, which they knew might be mischievous if they delivered it to the wrong person. The telegram was supposed by the plaintiffs to be received, not from a stranger, but from persons who were in the habit of dealing with the defendants in the course of their business by means of a cipher, and it was the duty of the defendants to use the cipher with due care. This they failed to do, and therefore they are liable to compensate the plaintiffs for the injury sustained by them.

If the defendants are not liable in the present action very serious consequences will ensue. A telegraph company may deliver a message to a person for whom it is not intended, and may with

[1] L. R. 4 Q. B. 706.

[2] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

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impunity cause very great injury to the person who receives it and is induced to act upon it. The consequence will be that telegraph companies will become careless in the conduct of their business, and very great public detriment will be sustained.

A great analogy exists between the liability of a common carrier and a telegraph company: Sedgwick on *Damages*, sixth edition, p. 443; *New York and Washington Printing Telegraph Company* v. *Dryburgh*[1]. A carrier is bound to deliver safely the goods entrusted to him, and a telegraph company are equally bound to transmit to the proper recipients the messages which they undertake to send along their lines.

Watkin Williams, Q.C. (H. D. Greene with him), for the defendants.—*Collen* v. *Wright*[2] forms no exception to the general rule that no action will lie for an innocent misrepresentation; the principle of that decision is that a person who, by representing himself to be an agent, invites another to enter into a negotiation with him, shall be held liable for the consequences if that representation turns out to be untrue. The law does not imply any warranty by a telegraph company that the messages sent by them are correct; and from the nature of the business it is plain that the company do not warrant that those whom they employ shall not commit mistakes; their servants and agents may often be ignorant of the real meaning of a message, and they have no power of ascertaining in what sense the words are to be understood by the intended recipient. It may be true that negligence on the part of the telegraph company was not charged in *Playford* v. *United Kingdom Telegraph Company*[3]; but it is a fallacy to contend that this circumstance rendered that decision inapplicable, for negligence involves the omission of a duty, and here the defendants did not owe to the plaintiffs any duty, for no relation existed between them, and a duty can only be created either by law or by contract.

Herschell, Q.C., did not reply.

BRAMWELL, L. J.—I am of opinion that this judgement must be affirmed. The general rule of law is clear that no action is maintain-

[1] 35 Penns. Rep. 298.
[2] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.
[3] L. R. 4 Q. B. 706.

able for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by the plaintiffs' counsel, and primâ facie includes the present case. But then it is urged that the decision in *Collen* v. *Wright*[1] has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen* v. *Wright*[1], properly understood, shows that there is an exception to that general rule. *Collen* v. *Wright*[1] establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen* v. *Wright*[1]. If so, it appears to me that it does not apply to the facts before us, because in the present case I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and *Collen* v. *Wright*[1], and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred.

But then it is argued that this is a case of misfeasance, that is, a case of negligence. Now the defendants' counsel made a remark which seemed to me very just, namely, that before any person can complain of negligence, he must make out a duty to take care; and that that duty to take care can only arise in one of two ways, namely, either by contract or by the law imposing it. That it does not arise by contract in this case is shown by the observations which I have already made for the purpose of pointing out that there is no contract between the plaintiffs and the defendants. Does that duty arise by law? If it did arise by law, the con-

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

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sequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. It seems to me, therefore, that that point also fails the plaintiffs.

Further, the defendants did not guarantee that the message was authentic, and so far as they were concerned it might not be true. The action is not maintainable upon the ground of an implied warranty that the message was correct.

Another point raised was that the mistake was committed in the ordinary business of the defendants. I hardly know how that was made a separate ground of argument. Inaccuracy in a telegram is more likely to mislead than inaccuracy in a verbal statement: and the delivery of a telegraphic message is a more formal matter than the communication of a message by word of mouth. I cannot however see any distinction in principle between them.

It has been argued that if this action be not maintainable the consequences will be mischievous. I am not of that opinion. If it were held that a person is liable for a negligent misrepresentation, however bonâ fide made, a great check would be put upon many very useful and honest communications, owing to a fear of being charged, and perhaps untruly charged, with negligence. I do not think the rule upon which we are acting unreasonable either in itself or in its application to a telegraph company. It is to be recollected that a telegraph company are generally under some liability to the sender of the message, and if they are careless in delivering it and thereby occasion damage to him, he may maintain an action against them; and (apart from the natural desire to carry on their business properly so as to gain customers) the existence of this liability is a kind of security for the proper delivery of the messages entrusted to the telegraph company.

I wish further to say that I do not see any analogy between the liability of a common carrier and that of a telegraph company. A carrier is liable both to the person who employs him and also to the owner of the goods: but the plaintiffs did not employ the defendants, and they are not the owners of the message. Possibly

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some analogy may exist between the present facts and a case where a carrier has delivered goods to a person, for whom they were not intended, and who has in consequence suffered some loss or inconvenience; but I do not think that under such circumstances an action would be maintainable against the carrier; for the person to whom the goods were delivered might have refused to receive them, and when he took them in he accepted the risk flowing from a possible mistake of the carrier.

In no point of view is the present action maintainable.

BRETT and COTTON, L. JJ., delivered judgements to the same effect.

NOTE.—For an interesting discussion upon this case see Pollock on *Torts*, sixth edition, pp. 531 seq.—[ED.]

DAMAGE CAUSED BY INTERVENTION OF THIRD PARTY.

13 Geo. III. SCOTT *v.* SHEPHERD, 2 W. Bl. 892.

The fact that the damage alleged is ultimately caused only by the intervention of a third party does not excuse the original trespasser. Distinction between trespass and case considered.

18 Geo. III.

SCOTT *v.* SHEPHERD.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last Summer Assizes at Bridgwater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the Court on this case:—On the evening of the fair-day at Milborne Port, October 28, 1770, the defendant threw a *lighted squib*, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it *across* the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last term by Glyn, for the plaintiff, and Burland, for the defendant: and this term, the Court, being divided in their judgement, delivered their opinions *seriatim*.

NARES, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute Will. III, been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate: 21 Hen. VII, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. IV, 7, 8; Fitzh. *Trespass*, 110. The principle I go upon is what is laid down in *Reynolds* v. *Clarke*[1], that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. IV, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. VIII, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108. 95; 6 Edw. IV, 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122. 43; F. N. B. 202 [91 G]. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean, it is sufficient. *Qui facit per aliud facit per se.* He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *King* v. *Huggins*[2], *Parkhurst* v. *Foster*[3], *Rosewell* v. *Prior*[4]. And it was declared by this Court, in *Slater* v. *Baker*[5], that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

BLACKSTONE, J., was of opinion that an action of *trespass* did not

[1] Stra. 634. [2] 2 Ld. Raym. 1574. [3] 1 Ld. Raym. 480.
[4] 12 Mod. 639. [5] M. 8 Geo. III; 2 Wils. 359.

18 Geo. III.

Scott v. Shepherd. — Blackstone, J.

lie for *Scott* against *Shepherd*, upon this case. He took the settled distinction to be, that where the injury is *immediate*, an action of *trespass* will lie; where it is only *consequential*, it must be an action on the *case*: *Reynolds* v. *Clarke*[1]; *Haward* v. *Bankes*[2]; *Harker* v. *Birkbeck*[3]. The *lawfulness* or *unlawfulness* of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the Court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over, and is hurt, an action on the case only lies, it being a *consequential* damage; but if in throwing it I hit another man, he may bring trespass, because it is an *immediate* wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. IV, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; per Powel, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that *lawful* or *unlawful* is quite out of the case; the solid distinction is between *direct* or *immediate* injuries on the one hand, and *mediate* or *consequential* on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was *immediate* or *consequential* only; and I hold it to be the latter[4].

De Grey, C. J.—This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accom-

[1] Ld. Raym. 1401; Stra. 634. [2] Burr. 1114. [3] Burr. 1159.

[4] This judgement is printed, although dissentient, as the principles enunciated therein were accepted by the rest of the Court, although there was a difference of opinion as to their application to the facts of the case. See note to *Gregory* v. *Piper*, *supra*.—[Ed.]

panied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c.—They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant: and I am of opinion that in this case it is. The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it;—*Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter: Fost. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95 a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis

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was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the *chevaux de frise* in the road was dangerous to the safety of persons using it. The ground of defence in point of law taken at the trial and on the argument on the rule was, that, although if the injury had resulted from the use of the *chevaux de frise* hurdle as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable; yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a *dangerous instrument* on the road had been the primary cause of the evil, by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is the case of *Scott* v. *Shepherd*[1]. In that case the defendant threw a lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which, in self-defence, took it up and threw it across the market-house. It fell upon another standing, the owner of which, in self-defence, took it up and threw it to another part of the market-house, and in its course it struck the plaintiff, and exploded and put out his eye. The defendant was held liable, although without the intervention of a third person the squib would not have injured the plaintiff.

In *Dixon* v. *Bell*[2] the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and, thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable,

[1] 3 Wils. 403; 2 W. Bl. 892, and *supra*, p. 530. [2] 5 M. & S. 198.

'as by this want of care,' says Lord Ellenborough—that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed—'the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.'

In *Ilott* v. *Wilkes*[1]—the well-known case as to spring-guns—it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Bayley and Holroyd, JJ., appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In *Jordin* v. *Crump*[2] the use of dog-spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

In *Illidge* v. *Goodwin*[3] the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C. J., ruled that, even if this were believed, it would not avail as a defence. 'If,' he says, 'a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done.' *Lynch* v. *Nurdin*[4] is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in

[1] 3 B. & A. 304.
[2] 8 M. & W. 782.
[3] 5 C. & P. 190.
[4] 1 Q. B. 29.

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the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgement was delivered by Lord Denman. He says, 'It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.' And then, by way of illustration, the chief justice puts the case of a gamekeeper leaving a loaded gun against the wall of a playground where schoolboys were at play, and one of the boys in play letting it off and wounding another. 'I think it will not be doubted,' says Lord Denman, 'that the gamekeeper must answer in damages to the wounded party.' 'This,' he adds, 'might possibly be assumed as clear in principle, but there is also the authority of the present chief justice of the Common Pleas in its support in *Illidge* v. *Goodwin*[1].' It is unnecessary to follow the judgement in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In *Daniels* v. *Potter*[2] the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendants' men were lowering casks into it, as the plaintiff contended, without proper care having been taken to secure it; the flap fell and injured the plaintiff. The defendants maintained that the flap had been properly fastened, but also set up as a defence that its fall had been caused by some children playing

[1] 5 C. & P. 190. [2] 4 C. & P. 262.

with it. But the only question left to the jury by Tindal, C.J., was whether the defendants' men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defence.

The cases of *Hughes* v. *Macfie and others*[1] and *Abbott* v. *Macfie and others*[1], two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect on the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendants' liability for his own act, where that act is the primary cause, though the act of another may have led to the immediate result.

The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held, that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so as to be a joint actor with him.

Bird v. *Holbrook*[2] is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden in order to catch a peafowl, the property of a neighbour, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences.

[1] 2 H. & C. 744; 33 L. J. (Ex.) 177.

[2] 4 Bing. 628.

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In the course of the discussion a similar case of *Jay* v. *Whitfield*[1] was mentioned—tried before Richards, C. B.,—in which a plaintiff who had trespassed upon premises in order to cut a stick and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In *Hill* v. *New River Company*[2] the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses passing along the road with his carriage took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell, and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In *Burrows* v. *March Gas and Coke Company*[3] it was held in the Exchequer Chamber, affirming a judgement of the Court of Exchequer, that where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gasfitter at work on the premises having gone into the part of the premises where the escape had occurred, with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately caused by the imprudence of the gasfitter's man in examining the pipe with a lighted candle in his hand.

In *Collins* v. *Middle Level Commissioners*[4] the defendants were bound under an Act of Parliament to construct a cut with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its

[1] 4 Bing. 644.
[2] 7 B. & S. 308.
[3] L. R. 7 Ex. 96.
[4] L. R. 4 C. P. 279.

western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. 'The defendants,' says Montague Smith, J., 'cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case.' 'The primary and substantial cause of the injury,' says Brett, J., was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or some one else did.'—'I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing a part of the injury.'

The case of *Harrison* v. *Great Northern Railway Company*[1] belongs to the same class. The defendants were bound under an Act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners, appointed under an Act of Parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition, but it was also found, and it was on this that the defendants relied as a defence, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless, the defendants were held liable.

These authorities would appear to be sufficient to maintain the

[1] 3 H. & C. 231; 33 L. J. (Ex.) 266.

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plaintiff's right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the Courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which in the ordinary course of things were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions. In *Greenland* v. *Chaplin*[1] Pollock, C. B., says: 'I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated.' Acting on this principle, the Court of Common Pleas, in a recent case of *Sharp* v. *Powell*[2], held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. It was held that as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened.

Bovill, C. J., there says: 'No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to

[1] 5 Ex. 243, at p. 248. [2] L. R. 7 C. P. 253.

occasion damage to a third person. When there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action.' And Grove, J., said: 'I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted.' And Keating, J., said: 'The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shown to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant.'

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case, but we doubt its applicability to the present, which appears to us to come within the principle of *Scott* v. *Shepherd*[1] and *Dixon* v. *Bell*[2], and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public

[1] 3 Wils. 403; 2 W. Bl. 892. [2] 5 M. & S. 198.

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or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan* v. *Atterton*[1] was cited before us as a strong authority in favour of the defendant. The defendant had there exposed in a public market-place a machine for crushing oilcake without its being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable, first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgement in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine

[1] 4 H. & C. 388; L. R. 1 Ex. 239.

which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful.

On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgement.

Judgement for the plaintiff.

BREACH OF STATUTORY DUTY.

1877. Atkinson *v.* Newcastle and Gateshead Waterworks Company, L. R. 2 Ex. D. 441 (C. A.).

Where the breach of a public statutory duty has caused particular damage to an individual, and the statute in question provides a special remedy for its breach, it is a question of construction in each case, to be decided upon the purview of the whole Act, whether the intention of the legislature was to take away the common law right of action of the individual or not.

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Atkinson *v.* Newcastle and Gateshead Waterworks Company.

Declaration: That by 26 Vict. cxxxiv (incorporating the Waterworks Clauses Act, 1847, 10 Vict. c. 17), the defendants were incorporated with certain powers of taking land and supplying and maintaining waterworks; that the plaintiff was the owner and occupier of a dwelling-house, timber-yard, and saw-mills situate within the limits prescribed by the defendants' Act for the supply of water by the defendants, and was under the provisions of the said Act, and the Waterworks Clauses Act, 1847, entitled, for reward to be paid by him to the defendants in that behalf, to a supply of water by the defendants, and had complied with all the provisions of the said Acts in order to entitle him to such supply for domestic and other purposes; that the defendants had laid down pipes near to the dwelling-house, &c., of the plaintiff for the purpose of supplying water according to the said Acts, and had fixed to such pipes fire-plugs; that nevertheless the defendants, neglecting their duty in that behalf, did not at all times, and especially at the time of the breaking out on the dwelling-house, &c., of the plaintiff of the fire hereinafter mentioned, keep charged with water their pipes to which fire-plugs had been fixed, under such pressure as by the defendants' Act and the Waterworks Clauses Act, 1847, was required, although the defendants were not prevented from so doing by frost, unusual drought, or other unavoidable cause or accident, or by the doing of necessary repairs. That, during the time the pipes, with the said fire-plugs affixed thereto, were so laid as aforesaid, a fire broke out in the timber-yard and saw-mills of the plaintiff, and by reason of the defendants

not having charged the pipes under such pressure as aforesaid, a proper supply of water could not be procured for the purpose of extinguishing the fire, and in consequence thereof the timber-yard and saw-mills were burnt down, and the plaintiff was greatly damaged.

Demurrer and joinder.

The Court of Exchequer held the declaration good[1] on the authority of *Couch* v. *Steel*[2].

The defendants appealed.

LORD CAIRNS, L. C.—In considering the sufficiency of this declaration, we may, as I pointed out in the course of the argument, reject at once all that part of it which relates to the supply of water for reward, for the breach alleged is not dependent on the payment of money. It is a breach of a duty to keep certain pipes, to which fire-plugs are fixed, charged with water at a certain pressure, a duty which is not made, by the Act creating it, to depend in any way upon the payment of money by anybody. That duty of so keeping the pipes charged arises under s. 42 of the Waterworks Clauses Act, 1847, by which it is enacted that 'the undertakers shall at all times keep charged with water, under such pressure as aforesaid (which by s. 35 is such pressure as will make the water reach the top storey of the highest house within the limits), all their pipes to which fire-plugs shall be fixed, ... and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same.' Now in my judgement the general scheme of these waterworks clauses, and of any Act in which they are incorporated, would appear to be this: A waterworks company, proposing to supply water to a town, apply to Parliament for powers to take certain springs and land, and to charge rates for the supply of water, in consideration of which powers being granted them they enter into certain obligations. Besides general obligations to supply the town commissioners with water for public purposes, they enter into certain special obligations as to fire-plugs, viz. to keep the pipes connected with those plugs charged with water at a certain pressure, and to allow all persons—not any particular persons, or owners of particular houses, but *all* persons—at all times to take

[1] L. R. 6 Ex. 404. [2] 3 E. & B. 402; 23 L. J. (Q. B.) 121.

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Lord Cairns, L. C.

water for the purpose of extinguishing fire without making compensation for it. The object for which the water is in such case to be used is a public object, and to effect that object the company are willing to accept the obligation to allow any person to take any quantity of water gratuitously, and further to keep the pipes from which that water is to be taken charged at such a pressure that the water so taken may be most effectively employed.

That this creates a statutory duty no one can dispute, but the question is whether the creation of that duty gives a right of action for damages to an individual who, like the plaintiff, can aver that he had a house situate within the company's limits and near to one of their fire-plugs, that a fire broke out, that the pipes connected with the plug were not charged at the pressure required by the section, and that in consequence his house was burnt down. Now, *à priori*, it certainly appears a startling thing to say that a company undertaking to supply a town like Newcastle with water would not only be willing to be put under this parliamentary duty to supply gratuitously for the purpose of extinguishing fire an unlimited quantity of water at a certain pressure, and to be subjected to penalties for the non-performance of that duty, but would further be willing in their contract with Parliament to subject themselves to the liability to actions by any number of householders who might happen to have their houses burnt down in consequence; and it is, *à priori*, equally improbable that Parliament would think it a necessary or reasonable bargain to make. In the one case the undertakers would know beforehand what they had to meet as the consequence of their neglect, they would come under definite penalties; in the other they would virtually become gratuitous insurers of the safety from fire, so far as water is capable of producing that safety, of all the houses within the district over which their powers were to extend.

It is, however, necessary to look at section 43, which imposes the penalty for the breach of the duty in question. That section deals with four classes of neglect, the neglect to fix, maintain, or repair fire-plugs, the neglect to furnish the town commissioners with a sufficient supply of water for public purposes, the neglect to keep the pipes charged under the required pressure, and the neglect to furnish any owner or occupier with the supply of water to which he is entitled. For each of those four classes of neglect

the company is visited with a penalty of £10. And in two of them, the second and fourth, the company is also to forfeit to the commissioners or the ratepayer aggrieved a further penalty of 40*s*. a day for every day during which the neglect continues after notice in writing given to the company. Now, why is it that in some cases there is a penalty which is to go into the pocket of the persons injured, and not in the case of neglecting to keep the pipes fixed to the fire-plugs charged under the proper pressure? The reason is obvious. In the former cases it is convenient to give a penalty to the individual, in the latter case it is not. In the cases of the town commissioners and the owners or occupiers asking for and not getting their proper supply of water, you have a person or persons known and determined to whom the penalty may be given, but in the case of neglect to keep the pipes properly charged there is no particular person whom you can single out beforehand, and say that in the event of a breach, he is to be entitled to the penalty. In that case then the only guarantee taken by Parliament for the fulfilment of the obligation, an obligation which has the appearance of being imposed for the benefit of the public, is what I may term the public penalty of £10. Apart, then, from authority, I should say, without hesitation, that it was no part of the scheme of this Act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action; but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of them, to the persons injured, but, where not convenient so to do, there simply to impose public penalties, not by way of compensation, but as a security to the public for the due performance of the duty. To split up section 43, and to say that in those cases in which a penalty is to go into the pocket of the individual injured there is to be no right of action, but that where no penalty is so given to the individual there is to be a right of action, is to violate the ordinary rule of construction. There being here in a certain number of cases a penalty which the plaintiff himself admits excludes the right of action, the conclusion is irresistible that in the remaining cases also in the same section the legislature intended to give no right of action.

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Now that would have been my opinion apart from authority. Is there then any authority which compels me to depart from that opinion? The only case which was cited to us in support of the plaintiff's contention was that of *Couch* v. *Steel*[1]. There a seaman of a merchant ship sued to recover damages for injuries sustained by him by reason of the omission of the defendant, a shipowner, to provide proper medicines for the ship's company. The declaration in that case was not framed upon any Act of Parliament, but on the argument of the demurrer one of the Merchant Shipping Acts was referred to as creating a duty in the shipowner to provide certain medicines for the benefit of the crew, and the case was put by counsel very much as if there had been a parliamentary obligation to provide a greatcoat or some specific chattel for each particular member of the ship's crew. The same Act which created the duty to provide the medicines imposed a penalty recoverable by a common informer for the omission to perform that duty; but it was there held that, notwithstanding the imposition of the penalty, an action lay at the suit of any one of the crew suffering special damage from such omission. With regard to that case, and the effect of that particular Act, I will say this, that if the matter were brought before this Court for review I should like to take time to consider whether, with reference to that particular Act, that case was rightly decided. I will not go further than that, for it is unnecessary here to enter into that question, the Act of Parliament under which the present action is brought being of a widely different character, and one which is open to observations which would not apply to the Merchant Shipping Act which was before the Court in *Couch* v. *Steel*[1]. But I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell[2] justify the broad general proposition that appears to have been there laid down—that, wherever a statutory duty is created, any person, who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview

[1] 3 E. & B. 402; 23 L. J. (Q. B.) 121.
[2] 3 E. & B. at p. 411; 23 L. J. (Q. B.) at p. 125.

of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works. The case of *Couch* v. *Steel*[1], therefore, is no authority to regulate our decision in the present case. I am of opinion, therefore, that the declaration discloses no cause of action, and that the judgement of the Court of Exchequer must be reversed.

COCKBURN, C. J., and BRETT, L. J., delivered judgements to the same effect, and the judgement of the Court below was reversed.

NOTE.—The principal case is always cited as the leading case on this subject, but it really deals only with a small portion of it.

The rules upon which a right of action for a breach of statutory duty depends are scattered over several cases which may be summarized as follows:—

Primâ facie the breach of a public statute is a misdemeanour, and the only remedy for it is by indictment or by an action at the suit of the Attorney-General as representing the public. But where a special and particular damage has been sustained by an individual, or where the statute enacts or prohibits a thing for his particular benefit, he has a remedy by action: *Couch* v. *Steel* (1854), 3 E. & B. 402, 23 L. J. (Q. B.) 121; *Boyce* v. *Paddington Borough Council* (1903), 1 Ch. 109. This general rule is exactly analogous to the rule which governs the right of a private individual to bring an action in respect of a public nuisance: see *Benjamin* v. *Storr*, *supra*.

The right of the private individual, however, as above stated, is subject to limitations. The first of these is that, although the injury complained of may have resulted from non-compliance with a statutory duty, it is still necessary to prove that the injury suffered is of a kind which is within the aim and scope of the Act creating such duty, and not merely an accidental result of its breach: *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Ward* v. *Hobbs*, L. R. 4 A. C. 13. The second is that laid down by Lord Tenterden, C. J., in *Doe d. Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. at p. 859 (cited with approval in the House of Lords in *Pasmore* v. *Oswaldtwistle, U. D. C.* (1898), A. C. at pp. 394 and 397). He says: 'Where an Act creates an obligation and enforces the performance in a specified manner we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case.' This 'general rule' as laid down by Lord Tenterden is further developed by Willes, J., in the case which is constantly quoted of the

[1] 3 E. & B. 402; 23 L. J. (Q. B.) 121.

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Wolverhampton New Waterworks Company v. *Hawkesford* (1859), 6 C. B. (N. S.) 236; 28 L. J. (C. P.) 242. He says: 'There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.'

Having regard to the principal case and other recent decisions, the third rule laid down by Willes, J., cannot now be regarded as an exact statement of the law, which probably would be correctly stated as follows:—Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, the general scope of the Act and the nature of the statutory duty must be looked at before a proper conclusion can be reached as to whether the legislature intended the statutory remedy to be the only remedy for the breach of the statutory duty. For this purpose the following matters must be taken into consideration—the nature of the injuries likely to arise upon the breach of the duty—the amount of the penalty imposed for the breach—the kind of person upon whom it is imposed—and whether the remedy so provided is to enure for the benefit of the person injured by the breach, or of members of a class to which he belongs, or not.

It is a question of construction in each case, and there is no general rule: see per Vaughan-Williams, L. J., in *Groves* v. *Lord Wimborne* (1898), 2 Q. B. at p. 416, and per Lord Macnaghten in *Johnson, &c., Company* v. *Consumers' Gas Company of Toronto* (1898), A. C. at p. 454.

The old jurisdiction of the Court of Chancery to restrain by injunction the commission of an act which would infringe a right of property still exists and may now be exercised by all Courts under the provisions of the Judicature Act, 1873, s. 25, s.-s. 8. This remedy is not subject to the same limitations as an ordinary action for damages at common law. Where it is established before a Court that a threatened breach of a statutory duty will infringe a right of property, the Court may interfere by injunction to restrain such breach, although the duty could not have been enforced by an action at common law: *Stevens* v. *Chown* (1901), 1 Ch. 894.—[ED.]

CONTRIBUTION BETWEEN JOINT TORT-FEASORS.

1799. MERRYWEATHER *v.* NIXAN, 8 T. R. 186.
1895. THE 'ENGLISHMAN' AND THE 'AUSTRALIA' (1895), P. 212.

An implied indemnity does not arise as between joint tortfeasors simply by reason of the payment by one of them of the whole or more than his share of the joint liability. But where one joint tortfeasor is otherwise entitled to be indemnified by another, as e. g. an agent by his principal, he does not lose his right to indemnity unless the joint act was known by him to be unlawful.

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ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill; and having recovered £840 he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial, before Thomson, B., at the last York Assizes, the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrongdoers; and, consequently, this action, upon an implied *assumpsit*, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending, that as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages; but

LORD KENYON, C.J., said—There could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought, where the former recovery was for a *tort*: that the distinction was clear between this case and that of a joint judgement against several defendants in an action of *assumpsit*: and that this decision would not affect cases of indemnity, where one

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man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

THE 'ENGLISHMAN' AND THE 'AUSTRALIA.'

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Summons (adjourned into Court) by the owners of the barque *Australia*, co-defendants in an action of damage by collision, calling on the plaintiffs, the owners of the steamship *Ada*, to show cause why on paying them (the plaintiffs) the amount of the damages and interest recoverable under the judgement in the action, and such other sum as might be the balance of costs and interest recoverable thereunder, the plaintiffs should not be ordered to execute to them (the defendants) an assignment of the judgement.

The facts giving rise to the application were shortly that—

On February 22, 1894, a collision occurred in the North Sea between the steamship *Ada* and the steamtug *Englishman*, which was at the time towing the barque *Australia*. The *Ada* sank and the *Englishman* was damaged. The owners of the *Ada* sued the tug and her tow, and the owners of the tug counterclaimed against the *Ada*.

At the trial before the President (Sir F. H. Jeune), assisted by two of the Elder Brethren of the Trinity House, the learned judge found all three vessels to blame, and by his decree condemned the defendants, the owners of the *Englishman* and their bail, and the defendants, the owners of the *Australia* and their bail, in a moiety of the damage sustained by the plaintiffs, and condemned the plaintiffs and their bail in a moiety of the damage sustained by the *Englishman*.

At the reference the moiety of the damages due to the plaintiffs, the owners of the *Ada*, and her master and crew proceeding for their effects, was assessed at £3,428 19*s.* 9*d.*, and with interest at 4 per cent., £80 8*s.* 3*d.*, made a total of £3,509 8*s.* The moiety of the damages due to the defendants, the owners of the tug *Englishman*, was assessed at £237 13*s.* 3*d.*, and the interest thereon amounted to £3 19*s.* 8*d.*, making a total of £241 12*s.* 11*d.*

It was contended on behalf of the defendants, the owners of the *Australia*, that the judgement was for the difference between those two sums, viz. £3,267 15*s.* 1*d.*, and that upon payment of that

difference to the owners of the *Ada*, together with £30 12*s.* 6*d.* for costs and interest, they were entitled to the assignment asked for under that part of s. 5 of the Mercantile Law Amendment Act, 1856, which deals with co-debtors.

BRUCE, J. [After referring to the facts, the decree in the action, and the result of the reference, the learned judge proceeded:]—The sum mentioned in the summons, viz. £3,267 15*s.* 1*d.*, is arrived at on the principle of deducting, from the amount in which the owners of the *Australia* and the *Englishman* have been condemned, the amount in which the owners of the *Ada* have been condemned in respect of the counterclaim established by the owners of the *Englishman* against the *Ada*. In other words, the owners of the *Australia* claim the benefit of the *Englishman's* counterclaim, and propose to pay to the *Ada* no more than the *Englishman* would be bound to pay.

The application is based on the provisions of s. 5 of the Mercantile Law Amendment Act, 1856. . . .

But it does not seem to me to be necessary to rest my decision upon a verbal criticism of the section. S. 5 of the Mercantile Law Amendment Act was never intended to apply to cases where there was no liability to contribute as between the persons jointly liable. It was intended to apply only in cases where the joint liability arose out of or sprang from contract. It was certainly never intended to overrule the principle of *Merryweather* v. *Nixan*[1], or to give a right to demand an assignment in cases where no right of indemnity exists. As in the course of the argument a good deal was said about *Merryweather* v. *Nixan*[1], it may be well that I should state the doctrine which it appears to me that case establishes.

The facts were these: The plaintiff and defendant had been held jointly liable to the extent of £840 in an action brought against them by the owner of a reversionary interest in a mill for damage done by them to the mill. The whole £840 was levied on the plaintiff, who sought to recover in an action of *assumpsit* contribution from the defendant. Thomson, B., held that no *implied assumpsit* arose as between joint wrongdoers, and nonsuited the plaintiff. Lord Kenyon and the judges of the King's Bench held the nonsuit right. Lord Kenyon said he had never heard of such

[1] 8 T. R. 186.

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an action having been brought where the former recovery was for a tort; that the distinction was clear between this case and that of a joint judgement against several defendants in an action of *assumpsit*. Then he added: 'This decision would not affect cases of *indemnity* where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right.' The meaning of that sentence is, I think, this: although no *implied* indemnity arises from the simple fact that one of two tortfeasors has paid the whole of the damage for which both are liable, yet this principle does not affect cases where one man has employed another to do acts for the purpose of asserting a right either under an express indemnity or under such circumstances as to raise an implied indemnity, provided the acts are not of such a character as to be obviously unlawful. *Adamson* v. *Jarvis*[1] affords an example of the class of cases to which Lord Kenyon referred. In that case the plaintiff, an auctioneer, sold goods under order of the defendant, and paid the proceeds to the defendant. The defendant induced the plaintiff to sell the goods by representing to him that the defendant was of right entitled to sell them, and the plaintiff in good faith acted on that representation. The defendant was not entitled to sell the goods, and the true owner recovered the value from the plaintiff, and the plaintiff brought his action against the defendant to recover the amount he had been so compelled to pay. The plaintiff was held entitled to recover. Best, C.J., said in the course of his judgement: 'The plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.' The circumstances of the case were such as to raise an implied warranty to indemnify. It was never decided in *Merryweather* v. *Nixan*[2] that one wrongdoer could not sue another for contribution, but that an implied promise to indemnify did not arise from the mere fact of payment of the whole of the joint liabilities by one of several wrongdoers. Where the circumstances are such as to raise a promise to indemnify, then the indemnity may be enforced, except, in the words of Best, C.J., in 'cases were the person seeking redress must be presumed to have known that he was doing an unlawful act.' If the person knew that the act he is engaged to do is not only wrongful but unlawful, then the promise to indemnify is an unlawful contract, in contra-

[1] 4 Bing. 66. [2] 8 T. R. 186.

vention of public policy, and one that cannot be enforced in law. *Betts* v. *Gibbins* [1] is a case of the same character as the one I have last referred to. The plaintiff dealt with goods under the orders of the defendant under such circumstances as to raise a promise on the part of the defendant to indemnify the plaintiff. There was nothing clearly illegal in the act of the plaintiff, and he was held to be entitled to recover on the implied indemnity.

The case of *Pearson* v. *Skelton* [2] was referred to in the argument. The plaintiff and defendant and several other persons were partners concerned in running a public stage-coach. A person whose horse was killed by the negligence of a coachman employed by the partners to drive the coach recovered damages against the plaintiff, and the plaintiff sought to recover contribution from the defendant. There appeared to be a partnership fund, out of which expenses were first to be paid, and the residue divided among the proprietors. The principle of *Merryweather* v. *Nixan* [3] did not apply, because there was an express contract regulating the rights of the plaintiff and defendant; but, notwithstanding, the action was held not to be maintainable at law, because the rights of the partners could only be adjusted in the Court of Chancery.

An examination of the cases has led me to the conclusion that the actual point decided in *Merryweather* v. *Nixan* [3], that an implied indemnity does not arise as between joint tortfeasors, simply by reason of the payment by one of the whole of the joint liability, has never been questioned. Circumstances may exist, as in some of the cases referred to, which give rise to an implied indemnity, or there may be an express indemnity, and where there is such an indemnity, implied or express, it may be enforced, unless the contract of indemnity relates to the doing of an act which is illegal, and must be presumed to have been known to be illegal by the person seeking to enforce the indemnity. This view of the law is quite consistent with the observations of Lord Herschell, L. C., in the case of *Palmer* v. *Wick Steam Shipping Company* [4], to which attention was directed in the argument. The Lord Chancellor is not speaking of the circumstances which may raise an implied promise to indemnify: he is addressing himself to the consideration of the alleged doctrine that one joint tortfeasor never can recover

[1] 2 Ad. & El. 57.
[2] 1 M. & W. 504.
[3] 8 T. R. 186.
[4] [1894] A. C. 318.

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from another, and he expresses the opinion that in cases where an express or implied indemnity exists, the doctrine can only apply to prevent the tortfeasor from recovering when he must be presumed to have known that he was doing an unlawful act. I do not think that the observations were intended to mean that, wherever the act done by joint tortfeasors was not in itself unlawful, an indemnity is to be implied from the mere fact that one tortfeasor has paid, under compulsion, the whole damages arising from the tort. So to lay down the law would be, as it seems to me, to overrule the exact point decided in *Merryweather* v. *Nixan* [1]. That, it is clear, Lord Herschell did not intend to do, because he says, 'It is now too late to question that decision in this country.' In fact, Lord Herschell does not seem to have done more than express his approval of the exposition of the law contained in the judgement of Best, C. J., in the case of *Adamson* v. *Jarvis* [2].

I have come to the conclusion that there are no circumstances in the present case to raise an implied promise of indemnity, and I do not think that the applicants are entitled to the order they seek.

Summons dismissed with costs.

[1] 8 T. R. 186. [2] 4 Bing. 66.

TORT AND FELONY.

1881. THE MIDLAND INSURANCE COMPANY *v.* SMITH AND WIFE, L. R. 6 Q. B. D. 561.

A felonious act may give rise to an action; but, as between the person injured and the felon, the policy of the law will not allow the former to seek civil redress if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice. *Quaere* how this rule can be enforced.

STATEMENT of claim was in substance as follows:—

It stated that the plaintiffs, by a policy of insurance, agreed with the defendant, Charles Smith, that if certain property therein described, or any part thereof, should be destroyed or damaged by fire at any time between June 21, 1880, and June 24, 1881, the plaintiffs would make good such loss or damage to an amount not exceeding £200; that on October 25, 1880, the defendant, Mary Smith, knowing the premises, and being by the direction and with the consent of the defendant, Charles Smith, in sole charge and control of the dwelling-house in which the goods insured were, and of the goods so insured, and maliciously purposing and intending to burn and damage by fire such property insured, and to injure the said company, and to create a claim on the said policy against the said company, wilfully lit, or caused to be lit, fires in the said dwelling-house, and thereby caused such property insured to be, and the same was, damaged and in part destroyed by the said fires; that the defendant, Charles Smith, had made a claim upon the plaintiffs, which claim arose from the said acts of the defendant, Mary Smith, and that by means of the premises the plaintiffs had incurred trouble and expense in investigating the said claim, and had become liable thereto, if any such liability existed.

The plaintiffs claimed £150, and to have the said policy given up by the defendant, Charles Smith, to be cancelled.

Demurrer.

WATKIN WILLIAMS, J.—The second point raised by the demurrer, namely, that an action cannot be maintained to recover damages for

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a wrongful act amounting to a felony, unless the public right has been first vindicated by a prosecution of the felon, has in the present view of the case ceased to be material, but as the case may go to the Court of Appeal I think it better not to pass the point over wholly unnoticed.

The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one; and I shall now shortly refer to the authorities upon each view. In support of the first view is the declaration of the judges in the case of *Higgins* v. *Butcher*[1] in the year 1606. The action was brought by the plaintiff against the defendant for damages for assaulting and beating his wife to death. In the report in Yelverton it is stated that Tanfield, J., with the concurrence of Fenner and Yelverton, said, in giving judgement for the defendant, that 'if a man beat the servant of *J. S.* so that he dies, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery it is now become an offence to the crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before and his action is thereby lost.' The report in Noy[2] says, 'By the Court that action will not lie, for the king only is to punish felony except the party brings an appeal.' The point, however, was not strictly necessary for the decision of the case, because the action was personal only to the wife and abated with her death.

[1] Yelv. 89. [2] Noy. 18.

In *Markham* v. *Cobbe*[1] Sir William Jones, in 1626, held that 'after conviction' upon an indictment 'for felony, the action did not lie because it is found to be felony by the verdict and inquest, and the party shall not be admitted now to make that trespass,' but Doderidge and Whitelock were in favour of the plaintiff, because the plea did not aver that the plaintiff had given evidence upon the prosecution, so as thereby to have entitled himself to restitution upon conviction, under the Statute 21 Hen. VIII.

In support of the second view there are a vast number of dicta of judges of the highest authority, but little or nothing of decisive authority. In *Dawkes* v. *Coveneigh*[2], in 1652, which was an action for damages after the conviction of the defendant for breaking the house of Dawkes and taking £250, Roll, C. J., denying that the trespass was drowned in the felony, said, 'This is after conviction, and so is here no fear that the felon shall not be tried; but if it were before conviction the action would not lie for the danger the felon might not be tried, and there is no inconvenience if the action do lie.'

Sir Mathew Hale's treatise upon the *Pleas of the Crown*[3], published after his death in 1681, in treating of the three means of restitution of goods stolen, viz. (1) By appeal of robbery; (2) by Statute 21 Hen. VIII, c. 11; and (3) by course of common law, says of the last that after conviction trover lies, but that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings trover, it lies not, for so felonies should be healed, and for this he cites *Dawkes* v. *Coveneigh*[2] and *Markham* v. *Cobbe*[4] above referred to.

The case of *Hudson* v. *Lee*[5], in 1589, seems to be a still earlier example of an action having been maintained for a felony. In *Crosby* v. *Leng*[6], decided in 1810, the plaintiff brought his action for that which proved to be a felonious assault, for which the defendant had been previously indicted, tried, and acquitted; there was a verdict for the plaintiff, subject to the opinion of the Court upon the question whether, after an acquittal, an action lay, and Lord Ellenborough, in giving judgement in the plaintiff's favour, said, 'The policy of the law requires that before the party injured

[1] Sir W. Jones, 147; Noy. 82.
[2] Sty. 346.
[3] 1 Hale, *P. C.* 546.
[4] Noy. 82.
[5] Rep. 43 a.
[6] 12 East, 409.

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by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence—if the acquittal be shown either in pleading or by evidence to have been obtained by collusion it would be put aside, and the objection would still remain.' The defendant, however, could not have set up his own felony by way of plea in bar, as was decided in *Lutterell* v. *Reynell*[1]. It may not be immaterial to notice that in the year 1819, by Statute 59 Geo. III, c. 46, the writ of appeal of felony, which was the ancient process by which the private suitor sought redress for his individual injury, was abolished on account of the oppressive nature of the proceedings under it. In the case of *Gimson* v. *Woodfull*[2], which was an action of trover for a mare stolen from the plaintiff by one from whom the defendant bought her, Best, C. J., nonsuited the plaintiff, saying, 'I am of opinion that the plaintiff has done nothing that he ought to have done. I take the law to be this—you must do your duty to the public before you seek a benefit to yourself, and then there is no necessity for a civil action.' This case, which was decided in the year 1825, is an express decision in point, but it was, as a decision, overruled in *White* v. *Spettigue*[3]. In 1827 the question was discussed in the Court of King's Bench in the case of *Stone* v. *Marsh*[4], which was an issue out of Chancery directed to try the right of the plaintiffs, the proprietors of some bank stock, against the defendants, who had innocently received the proceeds through a power of attorney forged by Fauntleroy for the transfer of the stock. Lord Tenterden, in giving judgement in the plaintiff's favour, said, 'Can the House set up this felony as an answer to the plaintiff's claim? In general a man cannot defend against a demand by showing on his part that it arose out of his own misconduct, according to the maxim, "Nemo allegans suam turpitudinem est audiendus." There is, indeed, another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action, not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him, but that he shall not sue the felon, and it may be admitted that he shall not sue others together with the felon in a proceeding to which

[1] 1 Mod. 282.
[2] 2 C. & P. 41.
[3] 13 M. & W. 603.
[4] 6 B. & C. 551.

the felon is a necessary party, and wherein his claim appears by his own showing to be founded on the felony of the defendant. The rule is founded in public policy,' which 'requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property or any equivalent or composition for a felony without suit, and of course cannot be allowed to maintain a suit for such a purpose.'

In 1845 the case of *White* v. *Spettigue*[1] was tried before Lord Cranworth. This was an action of trover brought by a solicitor against a bookseller, who had innocently purchased, and afterwards sold, certain books which had been stolen from the plaintiff. The learned judge told the jury that there was no evidence to show who stole the books, and the property in the goods, being originally in the plaintiff, could not be taken out of him by any act of a third party, and he directed them to find for the plaintiff, unless they believed the defendant received them knowing them to have been stolen, in which case the right would then merge in the felony, and the plaintiff would not be entitled to recover. The jury having found for the plaintiff, the defendant moved for a new trial on the ground of misdirection, citing *Gimson* v. *Woodfull*[2] as directly in point; and Lord Cranworth, in expressing his dissent from the ruling in *Gimson* v. *Woodfull*[2] as being too general, said: 'I think the true principle is, that where a criminal, and consequently an injurious, act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony and go for the conversion.' It was also considered that under the pleas, which were not guilty and not possessed, the point was not open to the defendant, and Lord Cranworth concluded by saying, 'With respect to what I said at the trial, that if the defendant had been the guilty receiver of the books he would be entitled to the verdict, I must retract that and suspend my judgement on that point, as I entertain some doubt whether I was correct.' This case, although it overrules *Gimson* v. *Woodfull*[2] as a decision, leaves the point under discussion undetermined.

The next reported decision seems to be *Wellock* v. *Constantine*[3] in

[1] 13 M. & W. 603. [2] 2 C. & P. 41.
[3] 2 H. & C. 146; 32 L. J. (C. P.) 285.

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1863. That was an action by the plaintiff, a young woman, 'for that the defendant assaulted and forcibly violated her person and debauched her, whereby she became pregnant.' The case came on for trial before Willes, J., when, after the plaintiff's evidence proving the forcible connexion, it was objected for the defendant that the action was not maintainable, and the learned judge so ruled, stating 'if a rape was proved, that could not form the subject of a civil action, but the plaintiff must proceed criminally, and if the connexion took place with the consent of the plaintiff no action would lie.' A rule *nisi* for a new trial having been obtained was afterwards discharged, Pollock, C. B., saying, 'The ground upon which the nonsuit proceeded was, that after it appeared that the civil wrong complained of, and for which a civil remedy was sought by action, involved a charge for felony, the proper course was not to proceed with the trial, but to prosecute for the criminal offence.' Bramwell, B., concurred, but Martin, B., dissented from their decision. This is a very strong and decisive decision, because, bearing in mind that the declaration stated on the face of it that the injury complained of amounted to a felony, and the only plea was not guilty, even the doctrine of merger would scarcely seem to justify a judge at *nisi prius* in nonsuiting a plaintiff upon the mere issue of not guilty; but the nonsuit was upheld and the decision was affirmed.

The question arose again in a very similar form in the case of *Wells* v. *Abrahams* in 1872[1]. This was an action of trover for a brooch; pleas, not guilty and not possessed; at the trial before Lush, J., the evidence showed a felonious taking; after a verdict for the plaintiff, the defendant having obtained a rule *nisi* for a new trial upon the ground that the act complained of proved to be a felony, and therefore that the action would not lie, this rule was discharged upon the ground that the judge, as a mere commissioner of *nisi prius*, could only try the issues joined, and had no power to direct a verdict for the defendant against positive and affirmative evidence in favour of the plaintiff. Cockburn, C. J., said: 'No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the

[1] L. R. 7 Q. B. 554.

injury has been prosecuted. But although this is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that if a person neglecting his duty to prosecute for an offence committed against him were to bring an action instead of prosecuting, the Court might be called upon to intervene and to prevent the plaintiff obtaining by judgement and execution the fruits of the action thus improperly brought.' Lord Blackburn was of the same opinion, and said: 'While the law throws the prosecution of criminal offences on private individuals, it may be in some cases that the civil remedy is suspended until there has been a prosecution for the felony. If an action were brought against a defendant, and it was stated by the Attorney-General, on behalf of the crown, that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried.' His lordship, after reviewing the authorities, expressed his disapproval of the nonsuit in *Wellock* v. *Constantine*[1], and stated that that case could not be treated as an authority. Lush, J., assented, upon the ground that the judge at *nisi prius* could only try the issues joined, and that it was not competent to him to interpose and stop the case in manner suggested; that if the declaration disclosed that which made it bad on demurrer or in arrest of judgement, that would not justify the judge at the trial in stopping the case. This case, although it actually decided no more than that a judge of *nisi prius* had no power to do more than decide the issues joined upon the record, tended strongly in the direction of proving that practically a civil action for damages might be maintained for a wrongful act amounting to a felony. The defendant could not plead his felony, the judge could only try the issues raised upon the pleadings, and there is no instance on record of the Attorney-General or the crown having interposed to stop the action. This position of the question is somewhat altered by the Judicature Act. The judge of *nisi prius* is no longer a mere commissioner to try issues; but by that Act (36 & 37 Vict. c. 66, s. 29) every judge acting under the ordinary commissions constitutes a Court of the High Court of Justice. In this uncertain state of the law the question was once more discussed

[1] 2 H. & C. 146.

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in the case of *Ex parte Ball, In re Shepherd*[1] in 1879, when the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have been first prosecuted, if it ever had any solid foundation, was finally exploded. The question arose in the bankruptcy of one Shepherd, who had been a clerk in the banking-house of Willis & Co., and had embezzled about £7,000 of their moneys. Willis & Co. had neglected to prosecute and had given the felon an opportunity for escape. Shepherd was made a bankrupt, and shortly afterwards Willis & Co. became bankrupt, and Ball having been appointed their trustee, brought in a proof upon Shepherd's bankruptcy for the £7,000, and the question was whether it could be allowed on account of the felony. The lords justices held that the trustee in bankruptcy, against whom no charge of neglect to prosecute could be brought, was entitled to prove for the debt. Bramwell, L. J., said: 'The law upon this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that of Blackburn, J., in *Wells* v. *Abrahams*'[2]; and he points out that there are 'only four possible ways in which the impediment can arise: (1) That no cause of action arises at all out of a felony. (2) That it does not arise till prosecution. (3) That it arises on the act, but is suspended till prosecution. (4) That there is neither defence to, nor suspension of, the claim by or at the instance of the felon debtor, but that the Court, on its own motion, or at the instance of the crown, may stay proceedings till public justice is satisfied.' But he points out difficulties in the way of each theory, and finally suggests that there is a great deal to justify Mr. Justice Blackburn's doubt. Baggallay, L. J., agreed with the result, and laid down the following propositions as resulting from the authorities: '(1) That a felonious act may give rise to a maintainable action. (2) That the cause of action arises upon the commission of the offence. (3) That notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice. (4) That this rule has no application to cases in which the offender has been

[1] L. R. 10 Ch. D. 667. [2] L. R. 7 Q. B. 554.

brought to justice at the instance of some other person, or in which prosecution is impossible by reason of the death or escape of the felon. (5) That the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect an action.' The resolutions laid down by Baggallay, L. J., appear to me to be sound and logical, and to be fully supported by the authorities when closely examined.

The question in the present case arises upon demurrer to the statement of claim, by which all that appears is that the plaintiffs are suing for damages for an injury caused by the felonious act of the defendant Mary; the only question, therefore, is, whether such an action is primâ facie maintainable, or whether upon the face of the claim it ought to be finally and conclusively rejected. In my judgement, upon this demurrer, the action may be maintainable in fact. There is nothing to show whether the plaintiffs have or have not neglected to prosecute the felon; and it is consistent with this demurrer that the felon may in fact have been convicted; and, as it seems clear to me that the prosecution of the felon is not an absolute condition precedent to the accruing of the cause of action, the statement of claim is primâ facie sufficient, so far as the present point is concerned

NOTE.—This rule could not be enforced by plea, demurrer, or application to nonsuit; but, apparently, it is in the power of the Court to strike out a pleading which discloses such a cause of action, upon a summary application, where the plaintiff is the party injured by the felony: see *Appleby* v. *Franklin* (1886), L. R. 17 Q. B. D. 93.—[ED.]

SURVIVAL OF CAUSES OF ACTION.

1883. PHILLIPS *v.* HOMFRAY, L. R. 24 Ch. D. 439 (C. A.).

At common law an executor represented the debts and property, but not the person of the testator. He was therefore not liable to be sued for damages for any personal or other torts committed by his testator. But where property of another had come into the possession of the testator by means of a tort, the person injured might waive the tort (*Smith* v. *Baker*, L. R. 8 C. P. 350) and recover the property or its value by appropriate action. *Actio personalis moritur cum personâ.*

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THIS suit was instituted in the year 1866 by the plaintiffs against S. Homfray and other persons, including the deceased R. Fothergill, praying for a declaration that the defendants were liable in respect of certain coal and ironstone gotten and removed by them from under the plaintiffs' farm, for an account of the coal and ironstone gotten by them from under the farm, for an account of coal and ironstone conveyed from the defendants' own mines through roads and passages under the plaintiffs' farm, and that the defendants might be decreed to pay for the coal and ironstone wrongly gotten by them from under the plaintiffs' farm at their proper value, and also to pay a wayleave rent or compensation in respect of their user of the roads and passages under the plaintiffs' farm for the conveyance of their own coal and ironstone; also that they might pay compensation for the damage done to the surface of the plaintiffs' farm, and for other relief. On August 28, 1869, W. H. Forman, one of the defendants, died, and the suit was revived against his executors. The cause came on for hearing before Vice-Chancellor Stuart, together with the cross-suit of *Fothergill* v. *Collins*, in which the defendants in the first-named suit prayed against the plaintiffs in the first-named suit specific performance of an agreement for sale of the plaintiffs' farm. On May 9, 1870, a decree was made in both suits by the Vice-Chancellor which was appealed from. The appeal came on for hearing before Lord Hatherley, L. C., who, on June 30, 1871, made an order varying the decree of the Vice-Chancellor.

By the Vice-Chancellor's decree, as varied on appeal, it was, amongst other things, declared that the defendants Fothergill and S. Homfray in the first suit, and the estate of the deceased defendant W. H. Forman in the first suit, were answerable to the plaintiffs in the first suit for and in respect of all coal, ironstone, and other produce at any time gotten or removed by them, or by their order, or for their use, under the plaintiffs' farm, or any part thereof, and that the defendants S. Homfray and R. Fothergill were liable to make compensation to the plaintiffs in the first suit for user of all roads and passages under the said farm, and the following inquiries were directed—(1) An inquiry what quantities of coal, ironstone, and other produce have been so gotten or removed as aforesaid. And it was ordered that the market price or value, or as near thereto as may be, of all coal, ironstone, and other produce so gotten or removed as aforesaid at the pit's mouth (all just allowances being made to the defendants in the first suit in respect of their charges and expenses (if any) on account of the carriage to the pit's mouth or otherwise of such coal, ironstone, and other produce, but no allowance being made for the expense of getting, severing, or working the same) be certified. And it was ordered that the following further inquiries be made—(2) An inquiry what quantities of coal, ironstone, and other produce have been conveyed from the collieries and mines of the defendants in the first suit in the pleadings mentioned, or any of them, over or through the roads or passages under the plaintiffs' said farm. (3) An inquiry what amount, upon the result of the inquiry last directed, ought to be paid by the defendants in the first suit to the plaintiffs in the first suit for wayleave and royalty in respect of the user by the defendants in the first suit of the said roads and passages for the purpose of working their said collieries and mines. (4) An inquiry whether the said farm and the mineral property of the plaintiffs in the first suit under the same have sustained any, and if any, what amount of damage by reason of the manner in which the defendants in the first suit have worked the coal, ironstone, and other produce under the plaintiffs' said farm.

R. Fothergill died on September 19, 1881, and the suit of *Phillips* v. *Homfray* was revived against the defendant Mary Fothergill, as executrix of his will. In consequence of litigation with the lady of the manor in which the plaintiffs' farm is situate

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(see *Llanover* v. *Homfray*[1]) the above inquiries in *Phillips* v. *Homfray* were not proceeded with until July, 1882, when an order was made by Kay, J., in Chambers directing that the inquiry should be made by the official referee, who, after hearing the parties for some days, adjourned the case until July 1, 1883.

In February, 1883, a motion was made by Mrs. Fothergill before Pearson, J., that all proceedings under the second, third, and fourth inquiries might be stayed, and the official referee directed not to proceed with them.

Pearson, J., stayed the fourth inquiry but refused the motion as regards the second and third inquiries. Mrs. Fothergill appealed against this order as regards inquiries two and three, and the plaintiffs gave cross-notice of appeal as regards inquiry four.

BOWEN, L. J., delivered the judgement of COTTON, L. J., and himself. His lordship, after stating the proceedings as above down to the application to Pearson, J., proceeded as follows:—

The question raised in both appeals is how far the respective inquiries and the plaintiff's claim in virtue of which they were directed is affected by the principle *actio personalis moritur cum personâ*.

The plaintiffs' claim out of which the second and third inquiries spring is a claim to be compensated for the secret and tortious use made by the deceased R. Fothergill and others during his lifetime of the underground ways and passages under the plaintiffs' farm for the purpose of conveying the coal and ironstone of R. Fothergill and his co-trespassers. The judgement of Pearson, J., as to these two inquiries is based upon the view that this description of claim did not abate upon R. Fothergill's death, but was capable of being prosecuted against the assets in the hands of his executrix. That it is in form a claim in the nature of a claim for trespass, the damages for which were to be measured by the amount of wayleave which the defendants would have had to pay for permission to use the plaintiffs' ways and passages, cannot be disputed. But Pearson, J., was of opinion that this was one of the class of cases in which a deceased man's estate remained liable for a profit derived by it out of his wrongful acts during his lifetime. The learned judge founded his opinion upon certain language of Lord Mansfield in the case of *Hambly* v. *Trott*[2], to the effect that, so far as

[1] L. R. 19 Ch. D. 224.

[2] 1 Cowp. 374.

the act of the offender had been beneficial to himself, his assets ought to be answerable. We have therefore to consider, in the first place, what is the true limit and meaning of the rule that a personal action dies upon a defendant's death, and whether there is, or can be, in the circumstances raised by the case, a profit received by his assets, which the plaintiffs can follow.

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value, of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary—as such, lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognize in this indirect benefit which he may have received any

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ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits, of land, which have wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions, that we need not now discuss), may be pursued by the rightful owner, and recovered from the wrongdoer, or if he is dead from his estate. But there is a sense in which the term 'profits' is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained, to recover, not the rents or produce of land, or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. An action for mesne profits in this narrower sense will not lie at common law and apart from statute against executors, and no account would be decreed in equity, except in a case where the profits were either property or the produce, or profits, or value of property actually received. This line of demarcation has drawn itself in conformity with the classifications of forms of action known to the English law. As long as the maxim *actio personalis moritur cum personâ* is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequentially and indirectly with advantage to the wrongdoer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not, and the maxim would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law, and while it is so, ought not to be frittered away.

The judgement, however, of Pearson, J., is based upon certain *dicta* of Lord Mansfield in *Hambly* v. *Trott*[1], which are in form ambiguous, and it is necessary accordingly to examine these *dicta* with reference to the history of the maxim *actio personalis moritur cum personâ*. Whatever its wisdom or policy, the rule with certain limitations and explanations is as old as the English law. By the civil law, penal actions arising from wrong were not generally available against the heir, and certain actions *ex contractu* fell under the same disability. By the English law an executor represents the debts and property, but not the person of the testator.

[1] 1 Cowp. 374.

It seems to have been thought that there would be an injustice in making the executor stand in the place of the dead man when the causes of action were purely personal (see *Year Book*[1]). 'The taking up of an executorship,' says Bacon in his *Abridgement*, 'Executors[2],' 'is an engagement to answer all debts of the deceased and all undertakings that create a debt, as far as there are assets, but doth not embark the executor in the personal trusts of the deceased, nor is he obliged to answer for his several injuries, for none can tell how they might have been discharged or answered by the testator himself.' And even in some actions of contract, such as debt, where the testator could have waged his law, the executor was not held liable, for this would have been to deprive his executor of the benefit of the wager of law. As regards all actions essentially based on tort, the principle was inflexibly applied. There was, however, a species of personal actions to which the rule in question was not extended. These were such as were founded upon some obligation, contract, debt, covenant, or other duty to be performed: see *Pinchon's Case*[3]; *Wheatley* v. *Lane*[4]. If an injury has been done to the personal property of the plaintiff, for relief arising out of which *assumpsit* could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might still be sued. It was urged before us on behalf of the plaintiffs that they were entitled in the present case to waive the tort which had been committed against them by the deceased, and to treat the claim as substantially one of implied contract or account, upon the theory of an implied promise by him to pay for what he had done, or at all events on the principle that his estate had reaped some measurable benefit or profit from the wrong, which the executrix was not entitled as against the plaintiffs to retain. Reference was made to the analogy of the cases where an action for money had and received has been held to be maintainable for the proceeds of goods wrongfully sold, and to a more doubtful class of authorities in which it has been suggested that use and occupation would lie for the enjoyment of lands occupied, even in the absence of any demise by the plaintiff. It seems to us, as we have said, that the profits arising from a wrong done by a deceased man which can be followed against his estate are only such profits

[1] 19 H. VI, 66 b.
[2] Seventh edition, iii. 537.
[3] 9 Rep. 86 b.
[4] 1 Wms. *Saund.* 216 a.

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as take the shape of property or the proceeds or value of property withdrawn from the rightful owner and acquired by the wrongdoer. But in order to understand Lord Mansfield and the argument to which reference has been made, it is desirable to begin with some cases in the reign of Elizabeth which illustrate the matter.

The first is that of Sir Henry Sherrington (cited in Savile[1] and referred to by Lord Mansfield in *Hambly* v. *Trott*[2]). Sir Henry Sherrington had cut during his lifetime and converted to his own use certain oaks and growing trees upon land belonging to the queen. After his death the Attorney-General exhibited an information against his executrix, and Manwood, C.J., in giving judgement has used language which it seems to us has been misunderstood: 'In every case,' he says, 'in which a price or value has been set upon a thing in which the offence is committed, if the offender dies his executors shall be chargeable. As in this case the information is for cutting 100 oaks to the value of £100, or for taking 20 cattle of the queen, price £20, the executors are chargeable, but where the action or information is for trampling the herbage, &c., *ad damnum*, the executor shall not be chargeable.' The point of this judgement seems to us to be that the deceased had converted the queen's property to his own use during his lifetime, and the Attorney-General was held entitled to recover for the queen the property, or in default the value which represented the property or its proceeds. In *Sir Brian Tucke's Case* in the same reign[3], it was held by the Barons of the Exchequer that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator, 'No, not in the case of the king, because it is a personal wrong only.' The collocation of these two cases points to the distinction which we have drawn. The proceeds or value of actual property acquired wrongfully by the testator can be recovered against an executor, but the mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor.

In *Tooley* v. *Windham*[4] the plaintiff brought an action against the defendant under the following circumstances. The defendant's father in his lifetime had taken the profits of certain lands, whereupon the plaintiff had purchased a writ out of Chancery against

[1] p. 40.
[2] 1 Cowp. 371.
[3] 3 Leon. 241.
[4] Cro. Eliz. 206.

the defendant with the intention of exhibiting a bill against him. Upon the return of the writ for the said profits the defendant, in consideration that the plaintiff would forbear his suit, promised the plaintiff that if he would prove that his father had taken the profits or had had the possession of the lands under the title of the plaintiff's father, he the defendant would pay the plaintiff for the profits of the land. The Court held that this was no consideration for the promise, on the ground that the taking of the profits of the plaintiff's lands by the defendant's father was a personal tort for which neither the executor nor heir could be made to answer. So far as we are aware an action for mesne profits (or bare damages for wrongful possession or occupation of land) has never been considered maintainable at common law against the executors of the person who was wrongfully in possession.

But the language of Lord Mansfield in the case of *Hambly* v. *Trott*[1] is relied upon in the judgement of Pearson, J., as going beyond the above line, and it is important, therefore, to examine it in detail. That action was an action of trover brought against an administrator with the will annexed for a conversion by the testator in his lifetime. The plea was that the testator was not guilty. A verdict having been found for the plaintiff, the Court unanimously arrested the judgement on the ground that the cause of action as laid was a personal tort which died with the person. This was in accordance with the decision in *Baily's Case*[2]. The judgement in *Hambly* v. *Trott*[1] can therefore be no authority for the appellants' contention, but the language of Lord Mansfield, which has since been cited with approval by the highest tribunals, is of course entitled to the utmost weight. Lord Mansfield in the first place observes that no action of tort where the plea must be not guilty will lie against an executor. 'On the face of such a record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.' This is the inflexible rule. In mitigation of the apparent hardship Lord Mansfield proceeds, *obiter dicta*, to point out that in most cases where trover lies against the testator another action might be brought against the executor which will serve the purpose, and he gives the following illustration. An action on the custom of the realm against a common carrier is for a tort and

[1] 1 Cowp. 374. [2] Sir T. Raym. 71.

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a supposed crime. The plea is not guilty, therefore such action will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie instead. 'So,' continues Lord Mansfield, 'if a man takes a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.' And in further illustration of this distinction Lord Mansfield points out that in *Baily's Case*[1] the executor would have been liable for the value of the goods wrongfully sold by the testator, just as Sir Henry Sherrington's estate[2] was liable for the value of the trees he had cut and carried away. It is with reference to the above distinction that Lord Mansfield goes on to use the language which we think has been misunderstood. 'Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall. So far as the tort itself goes an executor shall not be liable, and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial his assets ought to be answerable, and his executor therefore shall be charged.' It seems to us that Lord Mansfield does no more than indicate that there is a class of cases in which *assumpsit* can be brought against a wrongdoer to recover the property he has taken or its proceeds or value, and that in such cases the action will survive against the executor. In the illustration given by him of the horse, he does not mean that an action for the use and hire of a horse wrongfully taken will always lie against an executor, but that it will lie whenever a similar action would have lain against the wrongdoer himself. The case he puts is the case of a horse taken and restored, not of a horse taken and held under an adverse claim, and we are not prepared to say that, if

[1] Sir T. Raym. 71. [2] Savile, 40.

absolutely nothing appeared in evidence except that a horse was taken and was afterwards brought back again, the owner might not recover for the use and hire of the horse on the hypothesis of an implied contract to pay for him. It is in such a sense that Lord Ellenborough, in *Foster* v. *Stewart*[1], clearly understood Lord Mansfield's language. We see nothing in the language of Lord Chelmsford in the House of Lords in *Peek* v. *Gurney*[2] to indicate that he understood it otherwise. If so, the true test to be applied in the present case is whether the plaintiffs' claim against the deceased R. Fothergill, in respect of which inquiries two and three were directed in his lifetime, belongs to the category of actions *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiffs have sued the deceased at law in any form of action in which 'not guilty' would not be the proper plea? If such alternative form of action could be conceived it must be either an action for the use, by the plaintiffs' permission, of the plaintiffs' roads and passages, similar in principle, though not identical, with an action for the use and occupation of the plaintiffs' land. Or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the plaintiffs. We do not believe that the principle of waiving a tort and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief. There have been, no doubt, instances in which, nothing further appearing in evidence but that one person is the owner of land and that another had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld: see *Hellier* v. *Sillcox*[3]. In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn, that the enjoyment was by permission of the rightful owner. On a somewhat similar principle an action by the lord of a market for stallage was held maintainable against a person who fixed a stall in the soil without leave or licence. The authority

[1] 3 M. & S. 191. [2] L. R. 6 H. L. 393.
[3] 19 L. J. (Q. B.) 295.

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of this latter case has been questioned: see *Turner* v. *Cameron's Coalbrook Steam Coal Company*[1]; and actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract: see *Churchward* v. *Ford*[2], per Pollock, C.B.; *Birch* v. *Wright*[3]. No doubt the mere enjoyment by one man of another man's property, real or personal, may be had under such circumstances as leave still open, as a reasonable inference, the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment-counter at a railway-station takes it on the implied promise to pay for it. So actions of *assumpsit* have been held to lie for the rents of land improperly received under pretence of title: see Bacon's *Abridgement*, 'Assumpsit'[4]; *Clarence* v. *Marshall*, per Bayley, B.[5]

One of the most remarkable instances of waiver of a tort is to be found in the case of *Lightly* v. *Clouston*[6], where the master of an apprentice who had been seduced from his service to work for another person was held justified in waiving the tort and bringing an action of *indebitatus assumpsit* for work and labour done against the tortfeasor. Lord Mansfield, in deciding the case, referred to the cases of the wrongful sale of goods, where, if the rightful owner chooses to sue for the produce of the sale, he may do it, the practice being an advantage and not a disadvantage to the defendant. The case was decided upon the ground that the labour of the apprentice belonged to his master, who might insist on an equivalent for it, or at all events, that the apprentice could not contract for the benefit of anybody except his rightful owner (see per Lord Ellenborough in *Foster* v. *Stewart*[7]). And actions in which the owners of goods wrongfully sold were held entitled to waive the tort, and to recover in *assumpsit* for the proceeds, had become familiar to the common law as far back as towards the end of the seventeenth century: see *Lamine* v. *Dorrell*[8].

The difficulties of extending the above principle to the present case appear to us insuperable. The deceased, R. Fothergill, by

[1] 5 Ex. 932.
[2] 2 H. & N. 446.
[3] 1 T. R. 378.
[4] Seventh edition, i. 336.
[5] 2 C. & M. 495.
[6] 1 Taunt. 112.
[7] 3 M. & S. 191.
[8] 2 Ld. Raym. 1216.

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carrying his coal and ironstone in secret over the plaintiffs' roads took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person. The case of *Kirk* v. *Todd*[1] seems to us materially in point. There the owners of certain dye-works sued the original defendants for fouling and polluting a brook. It was held that the action would not survive against their executors. The late Master of the Rolls used the following language: 'This was an action on a simple tort. It did not appear that the defendant had got any benefit by fouling the plaintiffs' stream, he had only injured the plaintiff. As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could recover only unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. IV, c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the common law remained in its simplicity.' In every case where one man fouls the flow of water to which another is entitled he probably saves himself expense by doing so. But the benefit to which the Master of the Rolls alludes appears to us to be some beneficial property or value capable of being measured, followed, and recovered.

It remains to be considered whether there is any equitable doctrine which can extend or vary the above rules of the common law. We can see none. An action for account will only, under such circumstances, lie where the defendant has something in his hands representing the plaintiffs' property or the proceeds or value of it. But if there were any such it could be recovered at law as well as in equity. It is true that the wrongful acts complained of were done in secret, but even if such concealment could raise in favour of the plaintiffs an equity to be relieved from the application of the principle *actio personalis moritur cum personâ*, which we

[1] L. R. 21 Ch. D. 484, 488.

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doubt, the fraud in this case was discovered during the lifetime of the deceased, R. Fothergill. The mere circumstance of the defendant's death, after the decree and before the accounts taken, would not raise any equity in the plaintiffs' favour, and as far as we can see the equity authorities relied upon in argument by the plaintiffs do not assist them. In *Bishop of Winchester* v. *Knight* [1] it was held that the lord of the manor might maintain a bill for an account of ore dug or timber cut by the defendant's testator. Lord Chancellor Cowper in giving judgement said, 'It would be a reproach to equity to say, that where a man has taken my property, as my ore, or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy.' But he added, that the trespass of breaking up meadow or ancient pasture-ground dies with the person. If the plaintiffs in the present action were to recover, it is difficult to see why a landlord should not be entitled in equity to an account against the executors of his tenant, for a profit indirectly derived or expense saved by the testator through breaking up ancient meadow- or pasture-land. In *Pulteney* v. *Warren* [2] an account of mesne profits was decreed against executors on the special ground that the plaintiff had been prevented by injunction afterwards dissolved from proceeding in ejectment against the testator in his lifetime, and that it ought to have been one of the terms on which the injunction was granted that the testator or his estate would compensate the plaintiff against the loss of such mesne profits if the injunction turned out to be unjust. It would follow that, had not such special grounds existed, the bill for an account of mesne profits would have been held not maintainable against the executors. *Pulteney* v. *Warren* [2] is therefore an authority which bears against the plaintiffs in the present case. In *Monypenny* v. *Bristow* [3] a suit was held maintainable against the executors for rents received during the continuance in possession of the testatrix, but the rents in question seem to have been rents which had actually been paid over to the testatrix and fell within the description of property taken by the trespasser.

The history of the case of *Marquis of Lansdowne* v. *Marchioness Dowager of Lansdowne* [4] appears to us to show that the doctrine of the Courts of Equity is in exact conformity with the distinction we

[1] 1 P. Wms. 406, 407.
[2] 6 Ves. 73.
[3] 2 Russ. & My. 117.
[4] 1 Madd. 116.

have pointed out. A bill was filed by a remainderman against the representative of a deceased tenant for life without impeachment for waste. Two causes of complaint were put forward by the bill. The first that the deceased tenant for life had been guilty of equitable waste by cutting down ornamental timber and young trees about the property. A second cause of complaint was dilapidations which he had permitted in and about the mansion-house. The defendants demurred to so much of the bill as related to the former grievance, and the demurrer was decided in favour of the plaintiff on the ground that the plaintiff was entitled to the proceeds of the equitable waste, and to relief against the assets of the tenant for life so far as they were augmented by such proceeds, and an account was directed as to the equitable waste. The second cause of complaint, which related to the dilapidations, was dealt with on the hearing [1]. The Master of the Rolls decided that no account of the dilapidations could be decreed, observing that 'with respect to incumbents the law was otherwise, and accordingly suits against their representatives were very common, but no instance of such suits by remaindermen had occurred.' It has always been held that ecclesiastical dilapidations by deceased incumbents do not fall within the rule *actio personalis moritur cum persond*. The fact that an account was granted in respect of the produce of the timber wrongly cut, but refused in respect of the dilapidations, shows that the profit which equity follows into the hands of the executors must be some profit of which the plaintiff has been deprived, and not merely a negative benefit which the testator may indirectly have acquired by saving himself the expense of performing his duty.

In *Gardiner* v. *Fell* [2] no doubt was suggested as to the right of the Court to decree an account of rents and profits against the personal representatives of a person who had taken possession under a mistake of law. It appears, however, to be probable, on the facts of the case, that the rents and profits in question were rents and profits actually received in the shape of moneys or actual property by the deceased, as distinguished from the mere wrongful use and occupation of land or houses.

It was pressed upon us by the counsel for the plaintiffs that, the decree having been made and the inquiries directed during the life-

[1] 1 Jac. & W. 522. [2] Ib. 22.

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time of the deceased R. Fothergill, his liability must be taken to have been pronounced, and that what remained to be done in the action was of a ministerial character only, and would not be affected by the maxim *actio personalis moritur cum personâ*. We cannot take this view. The claim of the plaintiffs is in substance, so far as these inquiries are concerned, an action for trespass. The inquiries, whatever the form of language in which they are directed, are an assessment of damages, and until they have been completed the action is still undetermined. It is of the essence of the rule that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages, and has not been perfected by judgement at the time of the death of the defendant, the rule applies: *Smith* v. *Eyles*[1]. It appears to us accordingly that the claims of the plaintiffs to which inquiries numbers two and three are directed are claims for unliquidated damages in respect of a wrong done, and that the object of the inquiries is to assess such unliquidated damages. Such claims, and the inquiries which relate to them, abated in our opinion upon the death of the deceased, R. Fothergill. The appeal of the defendant Mary Fothergill, as to inquiries numbers two and three will, therefore, be allowed, with costs. *A fortiori,* the claim in respect of which inquiry number four was directed, is a pure claim for damages for a wrongful act. It follows that, in our opinion, such claim and the inquiry under it abated by the death of R. Fothergill. The plaintiffs' cross-appeal must be dismissed accordingly, with costs. The order which Pearson, J., made as to inquiry number four will thus be extended to inquiries numbers two and three.

BAGGALLAY, L. J., differed.

[1] 2 Atk. 385.

TORTS OF MARRIED WOMEN AND INFANTS.

1900. EARLE *v.* KINGSCOTE, L. R. (1900) 1 Ch. 203, and 2 Ch. 585 (C. A.).

A married woman is liable for torts committed by her during coverture, but not for frauds which (1) are directly connected with a contract made by her, (2) are the means of effecting it, and (3) are parcel of the same transaction.

Before the Married Women's Property Act, 1882, though this liability was that of the wife, she could only be sued jointly with her husband. That Act has not removed the liability of the husband in that respect, but has only enabled a plaintiff to elect to sue the wife separately, if he wishes to obtain satisfaction out of her separate estate.

IN July, 1898, the plaintiff was requested by the defendant Georgiana Kingscote to join her in the purchase of some shares, and was asked by the said defendant to raise a sum of £2,000 to be invested in the purchase thereof, one half of the shares being for the plaintiff and the other half for the said defendant, who offered to be responsible for any loss that might be incurred by the plaintiff, and agreed that her own moiety should be charged with any loss accruing to the plaintiff.

The plaintiff was at first unwilling to entertain the said proposal, but on the representation by the defendant Georgiana Kingscote that she would by the investment in the shares be able in three months to repay a sum of £5,300 due from her to the plaintiff, the plaintiff consented to find or raise by promissory notes the sum of £2,000 in order to pay for the shares when purchased.

On July 23, 1898, the defendant Georgiana Kingscote telegraphed to the plaintiff that she had bought the shares, and that it (meaning the investment) was a 'real good thing,' and on July 25 she again telegraphed to the plaintiff to direct her solicitor to let the said defendant have £2,000 on the plaintiff's guarantee, at the same time requesting her not to mention the shares to him, and also stating that it was the last day for completing the purchase of the shares. Thereupon on the same day the plaintiff, relying on the representations of the defendant Georgiana Kingscote that she

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had bought the shares, and that the sum of £2,000 was required on that date to complete the purchase, telegraphed as requested to her solicitor, and signed and posted two promissory notes each for the sum of £1,000, payable to her solicitor, who discounted them, and paid the proceeds to the defendant Georgiana Kingscote for the sole purpose of paying for the shares. The notes became due on October 28, 1898, and the plaintiff thereupon paid the amount due thereon and took them up.

The plaintiff having applied to the defendant Georgiana Kingscote for particulars of the shares, and the defendant having refused to give the information asked, this action was commenced against her in order to protect the interests of the plaintiff in the shares, claiming a declaration that the defendant Georgiana Kingscote held the shares upon trust as to one moiety for the plaintiff, and as to the other moiety charged with repayment to the plaintiff of the balance of any loss and expenses in respect of the notes and interest, and that she was bound to indemnify the plaintiff against all losses incurred in respect of the notes and shares, and for an injunction to restrain the said defendant from parting or dealing with the shares. In opposition to a motion for an injunction, the defendant Georgiana Kingscote swore an affidavit in which she alleged that she had never purchased any shares at all with the said moneys. The defendant Howard Kingscote was then made a co-defendant by amendment. The plaintiff by her statement of claim alleged that if the allegation in the affidavit was true it was contrary to the statements made to the plaintiff, and that the defendant Georgiana Kingscote had wilfully and with the intent to deceive the plaintiff made a false and fraudulent representation that she had purchased the shares, in order to induce the plaintiff to raise and advance the sum of £2,000, and that the plaintiff had been thereby deceived and induced to raise and advance the same. It was not at the trial alleged that the defendant Howard Kingscote had any knowledge of the circumstances attending the advance, or had ratified his wife's actions, or had participated in the use of the moneys, but the plaintiff claimed that he was liable to her for the sum advanced, expenses and interest, and in damages.

While the above-mentioned motion was proceeding, £500 had been paid on account, but no further sum had been paid.

The above facts were admitted, and the question was whether

the defendant Howard Kingscote was liable for his wife's tort under the circumstances above set out.

December 1. BYRNE, J.—The common law affecting the point I have to decide is thus stated in *Liverpool Adelphi Loan Association* v. *Fairhurst*[1]: 'A feme covert is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife.'

In *Wright* v. *Leonard*[2] Willes, J., who delivered the judgement of Williams, J., and himself, states the law as follows[3]: 'As a general rule, a married woman is answerable for her wrongful act, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made so liable under colour of a wrong, exempts her from liability even for fraud, where it is "directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction." Such was the decision of the Court of Exchequer in *Liverpool Adelphi Loan Association* v. *Fairhurst*[4]. This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled, upon grounds of supposed policy only, to infringe further upon the general rule of law. We ought also to add that this exception, in favour of fraud accompanying a contract, does not, so far as we have been able to discover, exist in the civil law, nor in the law administered in the Court of Chancery, nor in that of Scotland.'

[1] 9 Ex. 429.
[2] 11 C. B. (N. S.) 258.
[3] p. 266.
[4] 9 Ex. 422, 429.

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I have read this last passage for the sake of the expression 'in favour of fraud accompanying a contract.'

Erle, C. J., and Byles, J., were of opinion that the representation made by the married woman was in its nature more fit to be classed with contracts than with wrongs, and in this respect they differed with the other judges, but they did not in any way dissent from the general proposition or from the law as laid down in the earlier case. Erle, C. J., indeed, cites it as an authority. The latter judge saw no reason for limiting the exemption of the husband from liability to the particular case in question in *Liverpool Adelphi Loan Association* v. *Fairhurst*[1], but it will be noticed that Willes, J., expresses the view that he and Williams, J., did not consider themselves entitled upon supposed grounds of policy only to infringe further upon the general rule of law.

Although an infant is liable for a tort, yet an action grounded on contract cannot be changed into an action of tort. Thus an infant has been held not liable for overriding a horse which he had hired: *Jennings* v. *Rundall*[2]; but where an infant had hired a horse and was expressly told not to jump him and did so and injured him, he was held liable, as it was just as much a tort as if he had taken the horse out of the plaintiff's stable without leave: *Burnard* v. *Haggis*[3].

It will be noticed in the last case that the wrong would never have been committed but for the contract, and so may be said in a sense to have been connected with it, and perhaps parcel of the same transaction, yet it was not the means of effecting (in the sense of obtaining) the contract.

I am of opinion that the cases in which the husband is to be held exempt from his common law liability for his wife's torts must be limited to cases in which the fraud is not only directly connected with the contract, and parcel of the same transaction, but is also the means of effecting (in the sense of obtaining) the contract, and that, without disregarding the observation I have mentioned of Erle, C. J., in *Wright* v. *Leonard*[4], I ought to follow the clearly-expressed view of Willes, J., and Williams, J., and avoid infringing further upon the general law than is justified by the authority of *Liverpool Adelphi Loan Association* v. *Fairhurst*[1].

[1] 9 Ex. 422.
[2] 8 T. R. 335; 4 R. R. 680.
[3] 14 C. B. (N. S.) 45.
[4] 11 C. B. (N. S.) 258.

In the present case the contract was effected prior to and independently of the fraud complained of, and I find myself unable to say that the fraud was the means of effecting the contract in the sense in which that expression is in my opinion used in the statement of the law I have quoted from *Liverpool Adelphi Loan Association* v. *Fairhurst*[1].

It follows that in this case I consider that the defendant Howard Kingscote is liable in damages for the tort complained of.

The defendant appealed, and upon such appeal the further question arose whether the husband's liability was removed by the Married Women's Property Act, 1882. The defendants were precluded from raising this point in the Court below by the decision in *Seroka* v. *Kattenburg* (1886)[2].

The Court of Appeal affirmed the decision of Byrne, J., upon the main question and upheld the decision in *Seroka* v. *Kattenburg*[2].

COLLINS, L. J., said:—Now, on the other point, as to the effect of the Married Women's Property Act, it seems to me that I cannot usefully add anything to the decision of the Court of Appeal in the case of *Weldon* v. *Winslow*[3], and the judgement of the Divisional Court in *Seroka* v. *Kattenburg*[2]. Those cases seem to put the question beyond reasonable doubt, and, but for the hesitation of my Brother Rigby, I should have thought it perfectly clear that the Married Women's Property Act does allow a married woman to be treated as a feme sole for certain purposes only, and gives her rights in respect of her separate property, and imposes liability upon her in respect of her separate property. It also relieves the husband from his common law liability for her torts and contracts made before marriage to the extent to which he takes a benefit from her property by the marriage. But, having done that, the Act leaves things as they were, and it is not the case that a person who has been injured by the wife's tort, committed during coverture, and who knows that the wife has no separate property, is now by the operation of this Act limited to an action against her in respect of her separate estate—a separate estate which perhaps does not exist. In my judgement the Act, in giving that person a right against the wife's separate estate, which may or may not exist, has

[1] 9 Ex. 422.
[2] L. R. 17 Q. B. D. 177.
[3] L. R. 13 Q. B. D. 784.

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not deprived him of the right to proceed against the husband in respect of a tort committed by her. It seems to me that the law is reasonably clear on that point, and that the appeal ought to be dismissed.

NOTE.—In *in re* Beauchamp (1904), 1 K. B. at p. 581, Vaughan Williams, L. J., well points out the distinction between the liability of a married woman in tort and in contract:—'Now by the common law, independently of the M. W. P. A. 1882, a married woman was liable to be sued for a wrong committed by her, and the husband, strictly speaking, was not liable to be sued at all for the tort. His only liability was to be sued jointly with her, because of the universal rule that the wife during coverture could not be either a sole plaintiff or a sole defendant; and it was decided in *Capell* v. *Powell*, 17 C. B. (N. S.) 743, that a husband who had obtained a divorce was not liable to be joined in an action of tort for a tort committed by his wife during coverture.

'It is manifest, therefore, that in the present case, in which the defendant at the date of the trial and judgement had been divorced, she alone remained liable for the tort, and the amendments, if any, which were required in the writ or pleadings went merely to the form and not to the substance of the cause of action. The case is very different from that of a breach of contract entered into by a wife during coverture. In such a case coverture is a plea in bar and not in abatement, and the cause of action given by the M. W. P. Act, 1882, and the remedy thereon are new, being created by Act of Parliament; whence it follows that, if the husband dies or obtains a divorce, this will not affect the statutory cause of action or the remedy thereof, but the remedy will remain a remedy against the wife's separate property, and the judgement in such an action will not create a personal debt from her, and therefore will not support a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g).'

The liability of an infant for his torts is generally the same as that of a married woman, save that where liability for an act depends upon any degree of intention or intelligence, as in fraud or negligence, it is material to inquire whether the infant is of an age when he is capable of the necessary amount of intelligence and foresight.

For the general rule see per Byles, J., in *Wright* v. *Leonard* (1862), 11 C. B. (N. S.) at p. 265. For the exception see *Lygo* v. *Newbold* (1854), 9 Ex. at pp. 305–6.

Further, where an action is really one of contract, the plaintiff cannot make an infant liable by framing the action so as to make it appear to be based on tort: *Jennings* v. *Rundall* (1799), 8 T. R. 335.—[ED.]

VOLENTI NON FIT INIURIA.

1891. SMITH *v.* BAKER AND SONS, L. R. 1891, A. C. 325.

One who has invited or assented to an act being done towards him, or who voluntarily enters upon a course of action involving a particular risk to himself, of which he is aware, cannot be heard to complain if he suffer thereby.

Volenti non fit iniuria.

APPEAL from a decision of the Court of Appeal.

The appeal arose in an action brought by the appellant in the County Court of Yorkshire, held at Halifax, to recover damages against the respondents (who were railway contractors) for injuries sustained by him whilst in their employment. The appellant had been working for the respondents on the Halifax High Level Railway for some months prior to the day on which he received his injuries. The duties assigned to him when he first entered their employment were to fill skips or crates with stones, which were to be lifted by a steam-crane, in order to be put into wagons. He was next engaged in slinging stones on to the crane, and about two months before the accident he was set to work a hammer and drill with two other servants of the respondents, he working the drill whilst they worked the hammer. On the day of the accident he was sent with two others to drill a hole in the rock in a cutting. Whilst they were thus employed, stones were being lifted from the cutting, which was seventeen or eighteen feet deep. The crane was on the top of the cutting, near the edge. In slinging a stone a chain was put round it and a hook hitched into one of the links. To this chain the chain from the crane was fastened. When the stones were clear of the bank the arm of the crane was jibbed in the one or the other direction, according to the position of the wagons into which the stone was to be loaded. If it was jibbed in one direction it passed over the place where the appellant was working. Whilst he was working the drill, a stone in the course of being lifted fell upon him, and caused serious injuries. No warning was

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given that the stone was to be jibbed in that direction. The plaintiff in his evidence stated that the men were jibbing over his head, that whenever he saw them he got out of the way, but at the time that the stone fell upon him he was working the drill and so did not see the stone above. One of his fellow workmen had in the plaintiff's hearing previously complained to the ganger of the danger of slinging stones over their heads, and the plaintiff himself had told the crane-driver that it was not safe. In cross-examination the plaintiff stated that he was a navvy, and accustomed to this particular work for six or seven years. He had been at it long enough to know that the work was dangerous; he had been at the same class of work in the same cutting when they were jibbing overhead every day; he was doing that safely for four or five months. Sometimes he could see the stones being craned up above him; when he saw them he got out of the way. At the close of the plaintiff's case the defendants' counsel submitted that the plaintiff must be nonsuited on his own admission as to his knowledge of the risk, citing *Thomas* v. *Quartermaine*[1]. The learned judge (Judge Snagge), however, refused to nonsuit. The only witness called for the defendants was Hanson, the ganger, who was superintending the work on the day of the accident, and under whose orders the plaintiff was. Hanson stated that they had put the sling-chain on to the stone in the ordinary way, but no explanation was given or suggestion made as to what was the cause of the disaster. He said the rule at the works was that every one should look out for himself; it was part of the plaintiff's employment to look out; the men ought to have stopped work while the stone was being jibbed round; that would be the safe way; he told the men to get out of the way. After the defendants' case closed the learned judge left several questions to the jury, which were answered by them as follows:—

1.—*Q.* Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied?—*A.* No.

2.—*Q.* Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, works, machinery and plant?—*A.* Yes.

[1] L. R. 18 Q. B. D. 685.

3.—*Q.* If so, were the employers (or some person engaged by them to look after the condition of the works, &c.) guilty of negligence in not remedying that defect?—*A.* Yes.

4.—*Q.* Was the plaintiff guilty of contributory negligence?—*A.* No.

5.—*Q.* Did the plaintiff voluntarily undertake a risky employment with a knowledge of its risks?—*A.* No.

6.—*Q.* Amount of damages (if any)?—*A.* £100.

Application was made on behalf of the defendants to have judgement entered for them, notwithstanding the findings of the jury, on the ground that the case ought not to have been allowed to go to them, the plaintiff having admitted that he knew of the risk and voluntarily incurred it. The learned judge directed judgement to be entered for the plaintiff for £100, the amount of damage assessed by the jury. Notice of a motion to set aside the judgement and to have judgement entered for the defendants was afterwards given in the Queen's Bench Division. The grounds stated in that notice, so far as are now material, were as follows:—

'That the case ought not to have been allowed by the judge to go to the jury, the plaintiff having admitted that he knew of the risk which caused his injury, and voluntarily incurred it.

'That on the plaintiff's own admissions, made on the trial of the action, a nonsuit ought to have been entered by the judge.

'That the entry of the said judgement for the plaintiff was and is bad in law, and that the judge ought not to have entered judgement for the plaintiff.'

The Divisional Court (Huddleston, B., and Wills, J.), before whom the appeal came, thinking that there was a conflict between the decisions of the Court of Appeal in the cases of *Yarmouth* v. *France*[1] and *Thomas* v. *Quartermaine*[2], which they were unable to reconcile, and which it was desirable that the Court of Appeal should explain, dismissed the appeal, at the same time granting leave to appeal.

The Court of Appeal (Lord Coleridge, C. J., Lindley and Lopes L. JJ.), reversed the judgement of the Court below and entered judgement for the defendants, mainly, or it may be said exclusively, on the ground that there was no evidence of negligence on the part of the defendants, although the Lord Chief Justice

[1] L. R. 19 Q. B. D. 647. [2] L. R. 18 Q. B. D. 685.

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expressed an opinion that the judgement of the County Court judge ought to be set aside on another ground also; namely, that the plaintiff had been engaged to perform a dangerous operation and took the risk of the operation he was so called upon to perform.

LORD HALSBURY, L. C.—My Lords, the objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the County Court itself, had jurisdiction to deal with. Now, the facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow workman in his hearing complained that it was a dangerous practice.

My lords, giving full effect to these admissions, upon which the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him looking out for himself, he consented to undergo this particular risk, and so disentitled himself to recover when a stone was negligently slung over his head or negligently permitted to fall on him and do him injury.

My lords, I am of opinion that the application of the maxim *Volenti non fit iniuria* is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against its being permitted to fall. My lords, I emphasize the word 'negligently' here, because, with

all respect, some of the judgements below appear to me to alternate between the question whether the plaintiff consented to the risk, and the question of whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition.

Now, I say that here evidence of negligence must by the form of procedure below be admitted to have been given, and the sole question to be dealt with is that with which I am now dealing. For my own part, I think that a person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, 'I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself.'

It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim, *Volenti non fit iniuria.* I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to any one else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over.

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It is, of course, impossible to maintain a proposition so wide as is involved in the example I have just given; and in both *Thomas* v. *Quartermaine*[1] and *Yarmouth* v. *France*[2], it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. Bowen, L. J., carefully points out in the earlier case (*Thomas* v. *Quartermaine*[1]) that the maxim is not *Scienti non fit iniuria*, but *Volenti non fit iniuria*. And Lindley, L. J., in quoting Bowen, L. J.'s, distinction with approval, adds[3]: 'The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.' And again, Lindley, L. J., says: 'If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it.' Again, Lindley, L. J., says: 'If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself.'

I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself. It is manifest that if the proposition which I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question.

[1] L. R. 18 Q. B. D. 685. [2] L. R. 19 Q. B. D. 647.
[3] L. R. 19 Q. B. D. 660.

As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim, *Volenti non fit iniuria*, is completely justified.

I have hitherto treated the question apart from the specific findings by the jury. But I am not disposed to think that those findings were not justified upon the evidence presented. They found that the machinery for lifting the stone from the cutting was not reasonably fit for the purpose for which it was applied, *taken as a whole*. I think the jury meant—and if they did so mean, I am of opinion that they were right—that, looking to the risk incurred by the men working below and to the possibility of the crane when worked (as in fact it was worked) letting stones fall, the machinery was not reasonably fit for the purpose for which it was applied, that is to say, not reasonably fit for securing that stones should not fall from it when slung over men's heads. And further, that if with such machinery the stones were being slung over men's heads, special warning ought to have been supplied to the men imperilled by such an operation, and that the employers were guilty of negligence in not remedying *such* a mode of working *such* machinery under *such* conditions of work.

I think the cases cited at your lordships' bar of *Sword* v. *Cameron*[1], and the *Bartonshill Coal Company* v. *McGuire*[2], established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act. In *Sword* v. *Cameron*[1] it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk; but nevertheless he was held entitled to recover notwithstanding that knowledge.

It seems to me that in the present case the right of the plaintiff to recover is far more clear than in *Sword* v. *Cameron*[1]. The

[1] 1 Sc. Sess. Cas., second series, 493. [2] 3 Macq. 300.

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interval given to the quarryman to seek shelter was the usual and ordinary one. But suppose in that case the employer had employed the quarryman to do something which by the very form of the employment prevented his hearing the signal which gave him warning to retreat? In this case, as I have pointed out, there was no warning and no signal, but the employer or his representative employed the plaintiff under such circumstances as disabled him from using his eyes for protecting himself against the risk.

It seems to me, therefore, that this is a case in which the plaintiff is entitled to recover, and I therefore move your lordships that the judgement of the Court of Appeal be reversed, and the judgement of the County Court judge restored.

LORD WATSON.—My Lords, it does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth, and other noble and learned lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 Vict. c. 42) that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. In *Sword* v. *Cameron*[1] the First Division of the Court of Session found a master liable in damages to a quarryman in his employment who was injured by the firing of a blast before he had time to reach a place of shelter, although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Company* v. *Reid*[2] in support of the proposition that the doctrine of collaborateur was unknown to the law of Scotland; but Lord Cranworth pointed out[3] that the decision did not turn upon the negligence of the fellow workman who fired the shot, and expressly stated that it was justifiable, on the ground that 'the injury was evidently the result of a defective system not

[1] 1 Sc. Sess. Cas., second series, 493.
[2] 3 Macq. 266, 273.
[3] Ib. 289–90.

adequately protecting the workmen at the time of the explosions.' The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Company* v. *McGuire*[1]. The judgement of Lord Wensleydale in *Weems* v. *Mathieson*[2] clearly shows that the noble and learned lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

The main, although not the sole, object of the Act of 1880 was to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they entrust the duty of superintendence, as if it were their own. In effecting that object, the legislature has found it expedient, in many instances, to enact what were acknowledged principles of the common law. Section 1, sub-s. 1 provides that the employer shall be liable in cases where a workman is injured by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer. I see no reason to doubt that an arrangement of machinery and tackle, which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the sub-section. Sometimes (as in the present case) when the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach. The employer may in such cases protect himself, either by removing the source of danger, or by making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent.

The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this, whether, upon the evidence, the jury were warranted in finding as they did, that the plaintiff did not 'voluntarily undertake a risky employment with a knowledge of its risks.' Whether the plaintiff appreciated the full extent of the peril to which he was

[1] 3 Macq. 310. [2] 4 Macq. 226.

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exposed or not, it is certain that he was aware of its existence, and apprehensive of its consequences to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If, upon that point, there are considerations *pro* and *contra*, requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. The defendants' case is that the evidence is all one way; that the plaintiff's continuing in their employment, after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading-bank.

The maxim, *Volenti non fit iniuria*, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was in the strictest sense of the term *volens*. The same can hardly be said of a slater who is injured by a fall from the roof of a house, although he too may be *volens* in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connexion with it, as well as upon other considerations which must vary according to the circumstances of each case.

It is material to notice that the Employers' Liability Act, under which the present action was brought, by s. 2, sub-s. 3, provides that a workman shall have no right to compensation for injuries caused by reason of any defect or negligence which is specified in s. 1, in any case where 'he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.' I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but, as was forcibly pointed out by Lord Esher, M. R., in *Thomas* v. *Quartermaine*[1] in cases where the employer and his deputies were personally ignorant of the defect, it is made a condition precedent of the workman's right to recover that he shall have given them information of it before he was injured. That does not lead me to the conclusion that the provisions of the Employers' Liability Act wholly exclude the application of the doctrine *Volenti non fit iniuria* to claims falling within the scope of the Act; but it does, in my opinion, show that the legislature did not intend that the statutory remedy given to the workman should be taken away simply by reason of his continuing in the same employment after he became aware of the defect from which he ultimately suffered.

There are many kinds of work in which danger is necessarily inherent, where precautions such as would ensure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and, in the absence of express stipulation to the contrary, the risk is held to be with him and not with the employer.

On the other hand, there are cases in which the work is not

[1] L. R. 18 Q. B. D. 689, 690.

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intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the master to remedy. In cases of that description the relations of the workman to the peril are so various that it is impossible to lay down any rule regarding the operation of the maxim which will apply to them all alike, and I shall refer to two instances only by way of illustration. The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as *volens*. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation.

I should be prepared to hold that, apart from the Act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work. In the circumstances of this case the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it. The complaints made to the foreman by his fellow workmen, coupled with the fact of their continuing to work, might be fairly construed as an intimation to the defendants that they must either discontinue the vicious practice of slinging stones over the heads of their workmen or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that they were willing to submit to it or to accept the risk of it. I am confirmed in that view by the decision in *Sword* v. *Cameron*[1], which came very near in its circumstances to the present case. There the dangerous practice consisted in firing a shot at so short an interval after notice to the workmen that they had not time to reach a place of safety, and the pursuer had continued to work until he was

[1] 1 Sc. Sess. Cas., second series, 493.

injured, in full knowledge of the practice and its attendant risks. The Court of Session held that the maxim, *Volenti non fit iniuria*, did not apply; and it appears to me that, in *Bartonshill Coal Company* v. *Reid*[1], Lord Cranworth approved of the judgement. It is true that in the Bartonshill cases there was no question directly raised in regard to the maxim; but the noble and learned lord examined the facts of *Sword* v. *Cameron*[2] in detail, and expressed the opinion, not that the decision might be explained, but that it was justifiable in the circumstances of the case.

This case, however, is under the Statute of 1880, and, as already indicated, I am of opinion that the mere fact of the plaintiff having continued in the employment of the defendants cannot defeat his statutory claim. I therefore concur with the majority of your lordships in thinking that the order of the Court of Appeal must be reversed, and the judgement of the County Court judge restored.

LORDS HERSCHELL and MORRIS concurred, LORD BRAMWELL differed, and the order of the Court of Appeal was reversed.

[1] 3 Macq. 290. [2] 1 Sc. Sess. Cas., second series, 493.

MASTER AND SERVANT.

1864. MORGAN *v.* THE VALE OF NEATH RAILWAY COMPANY, 33 L. J. (Q. B.) 260; L. R. 1 Q. B. 149 (Ex. Ch.).

Where a master uses due diligence in the selection of competent servants, and furnishes them with suitable means and appliances, he is not answerable to one of them for an injury received by him in consequence of the negligence of another while both are engaged in the same service [from headnote to the case of *Farwell* v. *Boston and Worcester Railroad Corporation*, set out in note to 3 Macq. H. L. C. at p. 316].

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BLACKBURN, J.—In this case the plaintiff was employed by the defendants, as their servant, to do work as a carpenter and joiner on their station whilst the railway traffic was being carried on in it by the servants of the defendants. In the course of this employment he got upon a ladder which was placed near to one of the turntables. The servants of the defendants, who were engaged in shifting a carriage, allowed it to project so far beyond the turntable that, in turning, the end of the carriage struck against the ladder, and the plaintiff was thrown off and injured. The verdict was directed for the defendants, with leave to move to enter a verdict for the plaintiff for £250. It must be taken to have been proved at the trial that there was negligence on the part of those who were shifting the carriage, and no contributing negligence on the part of the plaintiff, so that the plaintiff might have maintained an action against those actually shifting the carriage, and also against their masters, the defendants, unless the fact that the plaintiff was also the servant of the defendants forms a defence, and the question of law reserved must be taken to be, whether the nature of the plaintiff's employment was such as to make him and the servants by whose negligence he suffered, servants in a common employment, or as it is sometimes called 'collaborateurs,' within the rule which exempts the employer from responsibility to his servant, for the consequences of the negligence of a servant in

a common employment. I am of opinion that this rule ought to be discharged, as I think that the facts bring the case within the principle of the class of cases, of which *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*[1] was the first decided in an English Court, but which had previously been acted upon in America in the case of *Farwell* v. *The Boston and Worcester Railroad Corporation*[2]. That principle I take to be, that a servant who engages for the performance of services for compensation (this is the language used in the American case), does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services: the presumption of law being, that the compensation was adjusted accordingly, or, in other words, that those risks are considered in his wages. And that, where the nature of the service is such that as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master; and, consequently, that he cannot recover against his master for an injury so caused, because, as is said by Shaw, C. J., in *Farwell* v. *The Boston and Worcester Railroad Corporation*[2], 'he does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied.' If the master has by his own personal negligence or malfeasance enhanced the risk to which the servant is exposed beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or defective machinery, or the like, no defence founded on this principle can apply, for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment. No such point, however, arises in the present case. It was not suggested that the defendants negligently employed servants to manage their traffic who were not competent to do so, nor that the turntable was improperly made. The one point made was, that the plaintiff, who was employed to paint the station, was not employed in the same work as those who were employed in working

[1] 5 Exch. 343; s. c. 19 L. J. (Ex.) 296.
[2] 4 Metcalfe, 49; also printed in 3 Macqueen, 316.

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the railway traffic; and it was contended that it was essential that the servants should be in a common employment and working for a common object. And I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work; but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule. In *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*[1] the company's servant, who went as their servant in one of their trains, was, as one of the necessary and ordinary consequences of so doing, exposed to risk of injury from the negligence of those who worked the traffic; and the judgement of the Court, that his representatives could not recover against the company for his death, caused by the negligence of their servants working the traffic, was on the principle I have just stated; his death was held to be caused by a want of skill, the risk of which deceased had, as between himself and the defendants, agreed to run. I think it would be difficult to show that Hutchinson and those who worked the train which ran into him were engaged in any common service, in any sense of the words, which would not include the present case. In the case of *The Bartonshill Coal Colliery* v. *McGuire*[2] Lord Chelmsford, in commenting on the cases on this subject, observes, that in them 'it did not become necessary to define with any great precision what was meant by the words 'common service,' or 'common employment'; and, perhaps, it might be difficult, beforehand, to suggest any exact definition of

[1] 5 Exch. 343; s. c. 19 L. J. (Ex.) 296.
[2] 3 Macq. 307.

them. It is necessary, however, in each particular case to ascertain whether the servants are fellow labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence, in the course of his peculiar work is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him.' . . . 'There may be some nicety and difficulty in particular cases in deciding whether a common employment exists, but, in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at.'

These observations were made in a case in which the House of Lords reversed the decision of the Scotch Court of Session, who had held that the owners of the colliery were responsible to the miners whom they employed, for the negligence of their servant employed to work the engine which drew them up; on the ground that they were not servants employed in common work. All the law lords, in delivering their opinions that the Court of Session were wrong in their decision, concurred in saying that there was no inflexible rule of law releasing the master from responsibility in every case where the person injured by the negligence of his servant was at the time of the injury in the same master's service; and they certainly use language which, like part of what I have cited from Lord Chelmsford's opinion, seems to point to the common object of the service as being the limit of the rule; but, as was observed by Lord Chelmsford himself, with reference to the former decisions, there was nothing in the nature of the case before them to call for a precise definition of the limit; it was only necessary to decide that the case before them fell within it. I think, however, the principle, which I consider the true one, is sufficiently indicated by Lord Chelmsford in the passage I have just quoted, and by Lord Cranworth throughout his judgement. In *Waller* v. *The South-Eastern Railway Company*[1], Pollock, C. B., in his judgement refers

[1] 2 H. & C. 102; s. c. 32 L. J. (Ex). 205.

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to the observations thrown out by Lord Chelmsford, and in effect says, that in order to decide the case before him, he considers what are the damages which any servant engages to encounter, and looks at the probable dangers attendant upon entering on the engagement in question. That is, I think, the true principle, and the difficulty is to apply it in each case. Applying that principle to the case before them, the Court of Exchequer decided that a guard of a railway train had taken upon himself the risk of injury from the negligence of the servants whose duty it was to see that the rails were in good order. And applying the same principle to the present case, I think that we ought to hold that the plaintiff in accepting an employment to work in the station, whilst the traffic was being carried on, which must have brought him close to the traffic, accepted one which necessarily must have exposed him to danger from the carelessness of those conducting the traffic, and must be taken as between himself and his employers to have taken upon himself that risk. In this judgement my Brother MELLOR concurs.

COCKBURN, C. J., delivered judgement to the same effect.

This decision was affirmed in the Court of Exchequer Chamber (ERLE, C. J., POLLOCK, C. B., WILLES, BYLES and KEATING, JJ., and BRAMWELL, CHANNELL and PIGOTT, BB.).

NOTE.—The importance of the doctrine of common employment has been much diminished of late years by the passing of the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897. But there are still cases, not covered by those Acts, to which it applies.—[ED.]

1862. LIMPUS *v.* LONDON GENERAL OMNIBUS COMPANY, 32 L. J. (Ex.) 34; 1 H. & C. 526.

1867. BARWICK *v.* ENGLISH JOINT-STOCK BANK, L. R. 2 Ex. 259 (Ex. Ch.).

1877. RAYNER *v.* MITCHELL, L. R. 2 C. P. D. 357.

A master is responsible for the wrongful act of his servant, even if wilful, provided it was within the scope of the servant's employment, and was done in the course of the performance of the service for which he was engaged[1].

[1] On this subject see also the case of *Sanderson* v. *Collins* (1904), 1 K. B. 628, and the cases of *Gregory* v. *Piper* and *Hardaker* v. *Idle District Council*, reported *supra*.—[ED.]

LIMPUS *v.* LONDON GENERAL OMNIBUS COMPANY.

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LIMPUS v. LONDON GENERAL OMNIBUS COMPANY.

This was a bill of exceptions to the ruling of Martin, B.

The declaration stated that the plaintiff and defendants were each possessed of an omnibus, which was being driven by their respective servants along a public highway, and charged that 'the defendants, by their servant, so carelessly, negligently, and improperly drove, governed and directed their said omnibus and horses, that by and through the mere carelessness, negligence and improper conduct of the defendants, by their said servant, the omnibus of the defendants ran against the horses and omnibus of the plaintiff, and overturned it.'

Plea, not guilty.

At the trial, the driver of the plaintiff's omnibus stated, in evidence, that as he was driving from Sloane Street to Kensington he stopped to take up two passengers; that then the defendants' omnibus passed his, that after passing, the defendants' driver eased his pace; that the witness went on at his regular pace and overtook the defendants' omnibus; that there was room on the road then for five or six omnibuses abreast; that when the witness got up to the defendants' omnibus the latter was rather on the off side of the road, but that there was plenty of room to pass; that as the witness was going to pass, the defendants' driver pulled across the road, and one of his hind wheels touched the shoulder of one of witness's horses; that the defendants' driver threw the witness's off horse on to the bank; that the wheels also went up the bank, and the plaintiff's omnibus was upset. On cross-examination, he stated that the defendants' driver pulled his horses towards the witness's horses to prevent his passing.

Other witnesses stated that the defendants' driver pulled across the road for the purpose of preventing the plaintiff's omnibus passing on the off side; and that it was a reckless piece of driving on the part of the defendants' driver.

Some evidence was also given as to something that had taken place between the two drivers on a preceding day.

The defendants' driver, Whitechurch, swore that he passed plaintiff's omnibus as he took up the two passengers; that afterwards the plaintiff's driver put his horses into a gallop to pass defendants' again; that as soon as he got up, he, the defendants'

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driver, pulled across to keep the plaintiff's omnibus from passing him, to serve him as he, the plaintiff's driver, had served the witness; and that he, the witness, pulled across him on purpose. He stated further, that he was presented with the following regulations by the company, and that every driver was directed to act in accordance therewith: 'During the journey he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list, and not on any account to race with or obstruct other omnibuses, or hinder or annoy the driver or conductor thereof in his business, whether that omnibus be one belonging to the company or otherwise.'

Another witness for the defendant said, that the defendants' driver maliciously and spitefully drove his horses suddenly to the footpath.

Martin, B., directed the jury 'that where the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service, and that if the jury believed that the real truth of the matter was, that the defendants' driver, Whitechurch, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted carelessly, recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant; that if the act of Whitechurch, the defendants' driver, in driving, as he did, across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was, nevertheless, an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers, and so to interfere with the trade and business of the plaintiff's omnibus, the defendants were responsible; that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the said Thomas Whitechurch, and read in evidence to the jury, were immaterial if the said Thomas Whitechurch did not pursue them, and that what had occurred between the drivers of the plaintiff's and defendants' omnibuses on the day previous to the occurrence complained of was immaterial and irrelevant. But that if the true character of the act of the

defendants' servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.'

WILLES, J.—I am of opinion that the judgement ought to be affirmed. It appears to me that the direction given by my Brother Martin at the trial was a direction which is in accordance with principle, and which is sanctioned by authority. It is perfectly well known that there is no remedy whatever against a driver of an omnibus, and therefore it is necessary that for what the driver of an omnibus does in the course of his master's service, the master should answer. There should be some person who is capable of paying damages, and who may be sued by people who are injured by improper driving. It appears clearly to me that this was (and it was treated by my Brother Martin as) a case of improper driving, and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master, and out of the course of his employment—a fact upon which it appears to me that the case turns. This omnibus of the defendants was driven in before the omnibus of the plaintiff. Now of course one may say that it is no part of the duty of a servant to obstruct another omnibus, and that in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say, in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the masters the liability for the acts of their servants in the course of their employment, and the law is not so futile as to allow the masters, by giving secret instructions to a servant, to set aside their liability. I hold it to be perfectly immaterial that the masters directed the servant not to do the act which he did. As well might it be said that if a master employing a servant told him that he should never break the law, he might thus absolve himself from all liability for any act of the servant, though in the course of the employment. But there is another construction that may be put upon the act of an omnibus-driver in cutting in before another omnibus, and it is this, that he intended to get before it. That clearly was an act in the course of the employment. He was employed not only to drive the omnibus, which alone would be sufficient to uphold this summing up, but also to get as much money for his master as he could, and to do it in rivalry with other omnibuses driving along the road. It is not shown that the act of driving before the other omnibus was inconsistent with the employ-

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ment, when it is capable of being explained by the desire to get before the other omnibuses in the course of the traffic. I do not speak without authority when I treat that as the proper test, because I take the ordinary case of the master of a vessel, who, it must be assumed, is not instructed to do that which is unlawful, and who receives distinct instructions not to sell the cargo under any circumstances whatever; if the master in the course of his employment does necessarily sell a portion of the cargo under circumstances not altogether inconsistent with the master's employment, the shipowner is liable in damages to the person whose goods have been so sold. It appears to me, therefore, that the summing up is in accordance with the principle that the master should be liable for the acts done by the servant in the course of his employment. And it is also consistent with authority. I need do no more than refer to the authority of Lord Holt, in *Turberville* v. *Stamp* [1], and the authority of Lord Wensleydale in *Huzzey* v. *Field* [2]. It is part of the history of the law, that the judgement delivered by Lord Abinger, and apparently his, was a judgement prepared by Lord Wensleydale: and there, in Cr. M. & R. p. 440, that learned person lays down, that the proper question for the jury to determine is, whether what was done was in the course of the employment, and for the benefit of the master. These are the terms in which the learned judge laid down the law in the present case; and it appears to me, in so laying down the law, he was strictly accurate, as I feel bound to say, because it is the interest of every person who has to deal with servants, and is liable to be injured by them, that he should not be left without remedy by the law being loosely administered. I do not entertain a doubt but that the direction was perfectly correct.

BLACKBURN, J.—I am also of opinion that the direction excepted to is a sufficient direction to have given to the jury a proper guide in the particular case, which is all that a learned judge in directing a jury is called upon to do. It is agreed upon by all (I do not think there is any difference of opinion upon that) that a master is responsible for the improper act of his servant, even if it be wilful, reckless, or improper, provided the act is the act of the servant in

[1] 1 Ld. Raym. 264.
[2] 2 Cr. M. & R. 432; s. c. 4 L. J. (Ex.) 239.

the scope of his employment, and in executing the matter for which he was engaged at the time. In the present case, the learned baron, in directing the jury, tells them that, and tells them that perfectly accurately, but that alone would not have guided the jury, or assisted them in determining the case. It was, therefore, right that he should go on to give the jury a sufficient guide for the purpose of enabling them to understand what were the principles which they were to apply, in order to see whether the act was done in the course of the employment of the servant on this particular occasion. It is upon that part of the summing up that Mr. Mellish, in arguing here against the direction, has principally pointed his argument, saying, it gave the jury a wrong guide in the particular case. Now, we must look to what the particular employment was, in order to see what was the meaning that was said to be understood by the jury in reference to the particular act in the particular case before them. The defendants' servant was employed as the driver of an omnibus, and as such the scope of his employment was, not merely to carry the omnibus from one terminus to the other, but to guide it and to stop it, and to use it in every way that would be right and proper, exercising his discretion for the picking up of traffic, and forwarding his masters' interests in the trade. During the course of such a drive the driver of the omnibus cut in before another omnibus under circumstances from which the jury might have thought that he did it, not at all to further his masters' interests, but for the purpose of wreaking a private spite against the driver of a rival omnibus, so doing an act quite unconnected with his service and employment. The learned judge, having to tell the jury what was the test by which they would know whether it was in the service or not, used language that has been criticized in the course of the argument, in which he tells them, and perfectly rightly, that if it was done in the scope of the servant's employment in the course of the service, the defendants would be responsible; and he says, 'that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted carelessly, recklessly, wantonly and improperly, but in the course of his service and employment, and doing that which he believed to be for the interest of the defendants, then the defendants were

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responsible for the act of their servant.' Now it is perfectly correct, what Mr. Mellish said, that it is not by any means universally true, that every act supposed to be done for the interest of the master is done in the course of his employment. A footman might think, and rightly, that it was for the interest of his master that he should get on the box and drive the coach; but no one would say that to do so was in the scope of the footman's employment, and that the master was responsible for the wilful act of the footman in taking charge of the horses. But when you take it in relation to such a case as this, where the driver driving an omnibus cuts in before a rival omnibus, I think the test thus given by the learned judge to the jury was a perfectly sufficient guide to enable them to see whether the particular act was done in the course of the employment. He then goes on to say, if that were so, it was utterly immaterial if the driver did it contrary to instructions given by the masters. I believe we are all perfectly agreed that as to that point the direction was quite unimpeachable. He then proceeds at the end of his direction to some questions that might have occurred to the jury, and to point out that, if they were of opinion that the true character of the act of the defendants' servant was, that it was an act of his own, that he did this act not in consequence of his desire to further the interests of his employers, but that he did it entirely of his own act, and as master of his own acts, then the defendants, his masters, were not responsible. That meets the case I have already alluded to; if the jury came to the conclusion that he did it, not to further his masters' interests, not in the course of his employment as an omnibus-driver, but from private spite, with an object to injure his enemy, who may be supposed to be the driver of the rival omnibus, that would be out of the course of his employment. This seems to me to cure all possible objections, and to meet the suggestion that the jury may possibly have been misled by the previous part of the summing up. Under the circumstances, I am of opinion that the direction was sufficiently accurate to guide the jury, and, consequently, that there should be no *venire de novo*.

WILLIAMS, CROMPTON and BYLES, JJ., delivered judgement to the same effect; WIGHTMAN, J., dissented.

Judgement affirmed.

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The judgement of the Court (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH and LUSH, JJ.) was delivered by

WILLES, J.—This case, in which the Court took time to consider their judgement, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called—first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form:—

'Dear Sir,—Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1,000 quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(Signed) 'Don. M. Dewar, Manager.'

The plaintiff stated that in the course of conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury

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might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, 'I owed the bank above £12,000.' The result was that oats were supplied by the plaintiff to Davis to the amount of £1,227, that Davis carried out his contract with the government, and that the commissariat paid him the sum of £2,676, which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgement which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion, that the manager knew and intended

that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell* v. *Atherton* [1], the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time [2]—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved [3]. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo [4]. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, entrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of

[1] 7 H. & N. 172; 30 L. J. (Ex.) 337. [2] *Hern* v. *Nichols*, 1 Salk. 289.
[3] See *Laugher* v. *Pointer*, 5 B. & C. 547, at p. 554.
[4] *Ewbank* v. *Nutting*, 7 C. B. 797.

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their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws [1]. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong [2]. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

The only other point which was made, and it had at first a somewhat plausible aspect, was this:—It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael* v. *Goodman* [3]. The sheriff sued upon a bond; plea, that the bond was obtained by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a *venire de novo*.

Venire de novo.

[1] *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. (Q. B.) 148, explaining (at 3 E. & E. p. 683) *Roe* v. *Birkenhead Railway Company*, 7 Ex. 36; and see *Barry* v. *Midland Railway Company*, Ir. L. R. 1 C. L. 130.
[2] *Huzzey* v. *Field*, 2 C. M. & R. 432, at p. 440. [3] 8 A. & E. 565.

RAYNER *v.* MITCHELL.

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Appeal from the decision of the County Court of Yorkshire, holden at Leeds.

This action was originally brought in the Exchequer Division to recover damages for injury done to the plaintiff's cab by the negligent driving of the defendant's servant, and was remitted for trial in the Leeds County Court.

At the trial it was proved that on March 5, 1875, the plaintiff's driver, Alfred Wadsworth, was in the course of his employment going in the direction of Roundhay. He was on his near or right side, when, observing the defendant's horse and cart coming rapidly towards him on the wrong side of the road, he called out so as to give warning, and drew up on the footpath. While in this position, the horse and cart of the defendant came in contact with the plaintiff's cab, and did the injury complained of.

The course of the employment of the defendant's driver was that, with the defendant's horse and cart, he took out beer to private customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant.

On this particular day, March 5, 1875, the defendant's driver had, without permission, taken the defendant's horse and cart out of his master's stables for a purpose of his own, viz. to deliver a child's coffin at a relative's house at Roundhay, and, having accomplished his purpose, was returning home to Leeds.

Before the accident happened the defendant's servant had called at a public-house which the defendant supplied with beer, to inquire for empty barrels, and, having obtained one or two, he continued his journey to his master's brewery. Shortly after this he swerved from his own side of the road, and, proceeding at a rapid pace, drove on to the plaintiff's cab, and did the injury complained of; and the County Court judge found from the facts before him that there was no contributory negligence on the part of the plaintiff's servant, and that the defendant had received the casks collected from the servant, and given him the agreed price for such collection. He therefore gave judgement for the plaintiff.

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The question for the opinion of the Court was, whether upon the above facts the defendant was liable for the negligence of the driver of his horse and cart.

Cyril Dodd, for the defendant. The servant was not at the time of the happening of the accident either expressly or impliedly engaged in his master's business or service. He had taken out the horse and cart for a private purpose of his own, without the knowledge or permission of his master. The true principle is that stated by Cockburn, C. J., in *Storey* v. *Ashton*[1], 'I think, the judgements of Maule and Cresswell, JJ., in *Mitchell* v. *Crassweller*[2] express the true view of the law, and the view which we ought to abide by.—The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as a servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment.' *Patten* v. *Rea*[3] has no application: the servant there was acting in a manner sanctioned by his employer. Some stress seems to have been laid by the judge upon the fact of the defendant having paid the servant the customary 1*d.* for each cask brought home on the occasion in question. But, apart from the objection that this is relying upon a ratification of a tort, there can be no ratification without a knowledge of all the circumstances.

Hope, for the plaintiff. When the servant originally started, it must be conceded he was not acting in the business of his master. But, at the time the accident happened, he was in the act of performing a part of his ordinary duty.

[LORD COLERIDGE, C. J.—The question submitted to us is, whether upon the facts found the defendant was liable for his servant's negligence. The real question is, Was there any evidence

[1] L. R. 4 Q. B. 476, 479. [2] 13 C. B. 237; 22 L. J. (C. P.) 100.
[3] 2 C. B. (N. S.) 606; 26 L. J. (C. P.) 235.

to warrant the learned judge in finding that the man was acting in the course of his employment?]

In *Patten v. Rea*[1], Williams, J., says: 'It clearly is not necessary in cases of this sort that there should be any *express* request: the jury may imply a request or assent from the general nature of the servant's duty and employment.' In the words of Jervis, C. J., in *Mitchell* v. *Crassweller*[2], to render the master liable, it is enough if the servant was in the master's employ at the time of committing the grievance.

Dodd replied.

LORD COLERIDGE, C. J.—The cases which have arisen upon this subject have from the earliest time been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves. There is, however, no doubt as to the true principle which ought to guide us. It was laid down in Lord Holt's time, and repeatedly since, that, wherever the master entrusts a horse or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing entrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. That is undoubtedly a correct statement of the law; and, applying that principle here, the question is whether the act done by the servant in this case which caused damage to the plaintiff, was done by him in the course of his employment by his master, the defendant. My decision in this case depends upon the finding of the County Court judge. He finds that 'the course of the employment of the defendant's driver was, that, with the defendant's horse and cart, he took out beer to customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant.' That is a clear and distinct finding as to the scope of the servant's

[1] 2 C. B. (N. S.) at p. 614. [2] 13 C. B. at p. 246.

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employment. Then, did this accident happen whilst the servant was acting in the course of that employment? Certainly not. He went out with the horse and cart without the knowledge or permission of his master, and not upon his master's business, but for his own private purpose, viz. to deliver a child's coffin at the house of a relative at Roundhay; and, coming home after having accomplished that purpose, he called at a public-house which the defendant supplied with beer, and there picked up one or two empty casks, which he brought home to the brewery. The sole question is whether, having started out on a journey for his own purposes in the way described, did the fact that, in returning home, the servant took up some empty casks constitute a re-entering upon his ordinary duties, as the learned judge phrases it; or, in other words, did it convert the journey into a journey made in the ordinary course of his employment, so as to make his master responsible for his negligence? In substance and good sense I think it did not. I cannot, therefore, agree with the conclusion of the learned judge, that, at the time the damage complained of was done, the man was engaged in his master's employment. I think the judgement should be reversed.

LINDLEY, J., delivered judgement to the same effect.

Judgement for the defendant.

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The Crown cannot be sued for a trespass [i. e. a Petition of Right cannot be brought for a tort: *Tobin* v. *The Queen* (1864), 16 C. B. (N. S.) 310]; and an officer of State is not liable to be sued *as such* for the acts or defaults of his subordinates; but where he has expressly ordered the performance of a wrongful act he will be liable in his private capacity under the ordinary law of agency.

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Adjourned summons.

This action was commenced in December, 1896, against the Right Hon. George J. Goschen, M.P., and five other persons named in the writ and pleadings, and described as the Lords Commissioners of the Admiralty, and Major E. Raban, described as the Director-General of Naval Works, the object of which, as set out in the statement of claim, was for the purpose of establishing against the Lords Commissioners of the Admiralty and the

Director-General of Naval Works that they were not entitled to enter upon, or take possession of, or acquire by way of compulsory purchase, certain land the property of the plaintiffs, in the neighbourhood of Dartmouth, in the county of Devon, forming part of an estate known as the Mount Boone estate, for the purpose of establishing there a training college for naval cadets.

The plaintiffs then claimed a declaration that the defendants had no right either by statute or otherwise to enter upon, or to survey or mark out, any portion of the plaintiffs' land, or to acquire the same by way of compulsory purchase; an injunction to restrain the defendants from entering upon, surveying, or marking out, taking possession of, or attempting to acquire by compulsory purchase, the said lands or any part thereof; damages, and costs.

By the defence it was submitted that the Court had no jurisdiction to entertain the action; that the defendants were merely the agents of the Crown, owing no duty to the plaintiffs, and only responsible to Her Majesty and to Parliament, and that they were not liable to be sued in respect of acts done by them as part of the executive Government on behalf of Her Majesty; that whatever had been done with reference to the plaintiffs' lands was duly performed not by the defendants or any of them, but by the proper agents or officers of the Lords Commissioners of the Admiralty, acting by the direction of the executive Government under the Crown; and they submitted, as matter of law, that the action could not be maintained.

The defendants took out a summons under the Rules of the Supreme Court, Order xxv, rr. 2, 3, for trial of the preliminary point of law raised by the defence.

November 4. ROMER, J.—It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of State; and it further appears to me, as at present advised, that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official

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was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of State.

I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself: in which case he would be liable as an individual, just as a stranger committing the same act would be.

November 13. ROMER, J.—I have already stated some general principles of law which, in my opinion, are applicable to cases like the present, and I need not repeat what I have said. But I will apply those principles, and point out shortly what kind of action the plaintiffs might have maintained, and what kind they were not entitled to bring, against the present defendants in respect of the matters referred to in the statement of claim. The plaintiffs are complaining of an alleged trespass said to have been committed on their land, and for which they claim damages, and they ask for an injunction to restrain further trespass on the land which they say is threatened. Now, in the first place, inasmuch as the plaintiffs could not sue the Crown for a past or threatened trespass, they could not, in respect of any trespass, sue the defendants in the capacity of agents for or as representing the Crown. Again, the plaintiffs could not sue the defendants merely on the footing that, as representing a branch of the executive Government, the defendants were responsible for a trespass committed or threatened by some officials or persons in the employment or under the control of the Government, or of the Admiralty as a Department of the Government, even though those officials or persons purported to act on behalf of or as representing the Crown, or the Government, or the Admiralty. And further, even if some of the defendants, acting on behalf of the Crown, or of the Government, or of the Admiralty, had committed or threatened a trespass, that would not justify the plaintiffs in suing the other defendants if they had taken no part in the transaction. On the other hand, the plaintiffs could sue any persons actually committing or threatening the trespass, even though those persons only acted on behalf or by the authority of the Government, or of the defendants as representing the Admiralty. Moreover, I do not think the rights of the plaintiffs

would, of necessity, be confined to an action against those actually committing the trespass, who might be some very humble persons. If a trespass was committed by those persons by the order or direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship to have unlawfully ordered some of his sailors to take possession of a house and they obeyed his order, he could be sued for the trespass even though he himself remained on board his ship and did not personally go into the house. So, if any of the defendants had themselves ordered or directed the alleged trespass now complained of by the plaintiffs, and it was in consequence of such order or direction that the alleged trespass took place, or if any of the defendants threatened to order or direct further trespass, then they could be sued. But in this case they could be sued not because, but in despite of the fact that they occupied official positions or acted as officials. In other words, to sum up shortly the result of the above by the use of convenient phraseology, the plaintiffs, in respect of the matters they are now complaining of, could sue any of the defendants individually for trespasses committed or threatened by them, but they could not sue the defendants officially or as an official body. The question, then, before me narrows itself down to this: Is the present action one against the defendants as an official body, or is it an action against them as individuals? And in dealing with this question I ought also to consider the summons to amend issued on behalf of the plaintiffs, and the affidavits filed in support of that summons. Now on the facts before me, and dealing fairly with the writ and statement of claim, the conclusion I come to is that the present action was intended to be, and is, a claim against the defendants in their official capacity and not as individuals. They are described and sued, except as regards the defendant Major Raban, as the Lords Commissioners of the Admiralty, and he is described and sued as the Director-General of Naval Works. Throughout the statement of claim no distinction is drawn between them, and no act, order, direction, or threat by any of them individually is alleged. Paragraph one of the statement of claim sets forth the general nature of the plaintiffs' case, and shows that what the plaintiffs wish to do is to have some general question decided as between them and the defendants as representing the Admiralty. The correspondence

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referred to in the statement of claim is with the Admiralty, or with certain officials in an official capacity only. Then, so far as regards trespasses alleged to have been actually committed or threatened, the only material paragraphs are those numbered twelve and seventeen. Paragraph twelve alleges that the defendants had entered upon some portion of the plaintiffs' estate and placed stakes there. Now, it was admitted before me on behalf of the plaintiffs that it was not suggested, or intended to be suggested, that the defendants themselves had done this. The paragraph shows that in this action, when an act of the defendants is referred to, what is meant and intended to be alleged is the act of the defendants treated as an official body—that is to say, as a body representing the Crown or Government, or as responsible for the acts of all officials or persons acting or purporting to act on behalf of the Crown, or of the Government, or of the Admiralty. Then, all that is contained in paragraph seventeen is a general allegation that the defendants by their servants and agents have trespassed, and threatened to trespass again. That refers again, as I understand it, to acts alleged against them as an official body on the footing above mentioned. But any possible doubt as to what kind of action this is appears to me to be set at rest by the plaintiffs' summons to amend their writ and subsequent proceedings, and the affidavits filed in support of that summons. The affidavits state that the alleged trespass was committed by two marines acting under the directions of Mr. Shortridge, a civil engineer employed in Her Majesty's Dockyard at Devonport. Those affidavits do not allege any personal participation in the alleged trespass, or any threat of future trespass by, or by the order or direction of, any of the defendants. Then the summons asks for leave to amend the action by suing the defendants in their individual as well as in their official capacity, and by adding the two marines and Mr. Shortridge as co-defendants. In other words, the summons proceeds on the footing that the present action is one against the present defendants in their official capacity only; and I think the plaintiffs' own view as to their action is the correct one. It follows that, in my opinion, the present action as it stands is misconceived and will not lie.

TORTS COMMITTED WITHOUT THE JURISDICTION.

1876. THE 'M. MOXHAM,' L. R. 1 P. D. 107 (C. A.).

An action cannot be maintained in England for a wrong either to the person or to personal property committed abroad unless both the act (1) would have been an actionable wrong if committed in England, and (2) was not justifiable by the law of the country where it was committed. Whether any action is maintainable in England for a wrong to land situated abroad—*quaere*[1].

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THIS was a cause of damage instituted by an English company against the owners of an English ship to recover damages for the injury done, by the alleged negligent navigation of the ship, to a pier belonging to the English company, but situated in a Spanish port. The ship was arrested in Spain, but was released on an agreement with the owners that their liability should be determined by proceedings in the English courts. The owners pleaded as part of their answer that the collision happened within the territory of Spain, and that if it was caused by negligence it was negligence of the master and mariners of the ship, and that by the law of Spain the master and mariners, and not the owners, were in such a case liable for damages. The plaintiffs moved to strike out this part of the answer. Sir R. J. Phillimore, the judge of the Admiralty Division, held that the Spanish law was not applicable to the case, and directed the answer to be reformed accordingly.

The defendants appealed.

MELLISH, L. J.—A great many cases were cited in the argument, but they almost all relate to actions respecting either wrongs to personal property or actual personal injuries. Now, the law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the courts of this country on account of a wrongful act

[1] In the *British South Africa Company* v. *Companhia de Moçambique* (1893), A. C. 602, it was decided by the House of Lords that the English courts had no jurisdiction to entertain an action to recover damages for trespass to land situated abroad.—[ED.]

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either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country. The cases of *The Halley* [1] and *Phillips* v. *Eyre* [2], together with the other cases in conformity with them, seem to be conclusive upon the subject.

In the case of *The Halley* [1] it was a collision with a ship in foreign waters. By the law of the foreign country the ship was liable, and the owners were liable as owners of the ship, but by the law of England the ship and owners would not be liable, because there was a pilot on board, who was taken compulsorily on board, and who was navigating the ship, and the negligent act was his act. Upon that it was held that notwithstanding the ship and the owners were liable according to the law of the country where the act was committed, yet inasmuch as they were not liable by the law of England, no action could be maintained against them. Then, in the case of *Phillips* v. *Eyre* [2], which was an action brought for a wrong committed in a foreign country, it was decided that, as the liability of the defendant had been taken away by the law of the country where the act was committed, no action could be brought in this country. Therefore, if that is the rule respecting personal wrongs and respecting wrongs to personal property, it seems to me, *à fortiori*, that it must be the rule respecting wrongful acts to real property in a foreign country. Whether the rule as to wrongful acts to real or immovable property in a foreign country does not go still further and prevent an action being brought at all is a question which it is not necessary to determine in this case, because, having regard to the consent of the parties and the agreement that has been entered into, no such objection to the jurisdiction could be taken in this case. But it appears to me beyond all question that if the rule before mentioned is applicable to personal property and wrongs, it *à fortiori* must be applicable to damage done to real property in a foreign country.

But then it is said that though that is the general rule, yet here the act was not done in the foreign country, because the wrongful act was committed on board an English ship on the high seas. I agree that as to acts done on board a ship itself, no doubt the English ship carries the English law with it, but I am not convinced

[1] L. R. 2 P. C. 193. [2] L. R. 6 Q. B. 1.

that it carries the English law with it with reference to wrongful acts done by guiding an English ship against a pier which is part of the foreign country. It is unnecessary to consider what would be the rule in a case where the ship was outside the three-mile limit and had fired a gun which caused damage within the foreign territory, though I do not think that the case would present any more difficulty. Here the ship was really within the Spanish dominions at the time when it committed the wrong. As Mr. Clarkson put it, she was coming into a Spanish port, where she had no right to go except by licence given to her by the law of Spain, and where she was bound to obey the law of that country while she was there. In that position she comes into contact with that which is stated in the plea to be part of the soil of Spain, and this brings the case within the general rule that no action can be brought in this country in respect of an alleged wrongful act committed in a foreign country which act is not wrongful by the law of that country.

Then it was said by Mr. Benjamin that although that is perfectly true as a general rule, and although he admits that, if the act itself was not by the law of Spain considered to be wrongful, no action could be brought in this country, yet inasmuch as it is by the law of Spain considered a wrongful act as far as the master is concerned, therefore the question whether the master alone is liable, or the ship and the owners also are liable, is not to be governed by the law of Spain but by the law of England.

I do not think any sufficient authority has been cited for that proposition, and it appears to me that it would make a further distinction in the law which would have very inconvenient results. There is a well-known distinction between substantive law and mere procedure. If it could be proved that this question of liability turned upon mere procedure under the law of Spain, then that law would not be regarded in this country. But it appears to me that the rule that a particular person is not to be liable, although somebody else possibly may be liable, is a part of the substantive law of the country where the act is committed; and therefore if by the substantive law of the country where the act is committed a defendant is not liable, then he would be discharged altogether. If there is any authority wanted for that proposition, it is laid down by Parke, B., in the case of *General Steam Navigation Company* v. *Guillou* [1]. That was a case of an injury done on the high seas by

[1] 11 M. & W. 877, 895.

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a French ship, and there he says: 'The injury complained of is averred to have arisen on the high seas, out of the jurisdiction of England, and not to have been committed by the defendant personally, but by a third person, who was master of a French vessel, the defendant being a French subject. So far, the plea is free from obscurity. If the defendant was not liable for the acts of that other by that law which is to govern this case, he has a good defence to the action; and for the defendant it is contended that the plea means to aver that by the law of France he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body; and if such be the true construction of this plea, we are all strongly inclined to think that there is a good defence to this action.'

I am of opinion that that rule applies to this case, and that if by the law which is to govern the case the defendant is not liable for the act of the master, he has a good defence to the action; and if, therefore, the law which is to govern the case is the Spanish law, the defendant is not liable by that law, and has a good defence to the action.

JAMES and BAGGALLAY, L. JJ., delivered judgements to the like effect.

Appeal dismissed.

ED BRA JXc
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